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Reframing Child Custody Decisionmaking

NAOMI R. CAHN*

I. INTRODUCTION

The laws that apply to child custody determinations outside of the traditional nuclear family are based on conflicting concepts drawn from biology, contract, mental state, and psychology. In contested cases involving various forms of surrogacy, adoption, and the rights of unmarried fathers, the legal system has repeatedly grappled with the definition of "parent" and the rights to be accorded parental status in the context of determining the appropriate custodian for the child.[1] Indeed, how we determine who is the custodian of a particular child tells a story about legal understandings of the value to be accorded parenthood.

While courts claim that they can separate the decision on parentage from that on custody, their decisions show that they do not.[2] This is because parentage and custody are interrelated; pursuant to contemporary legal doctrines, the designation of parent inevitably dictates the rights of all parties involved. The determination of who can exercise parental rights affects who

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* Associate Professor, George Washington University Law School; LL.M., Georgetown University Law Center, 1989; J.D., Columbia University School of Law, 1983; A.B., Princeton University, 1979. Thanks to GW for its support of this Article; to Bob Brauneis, Paul Butler, Brad Clark, Greg Maggs, Joan Meier, Mike Selmi, and Bob Tuttle for their review of an earlier draft; to Tony Gambino, Jana Singer, and Merle Weiner for ongoing discussions, encouragement, and comments; and to Jennifer Kleeman, Samantha Southall, and Michelle Wu for research assistance.

[1] For articles considering the meaning of "parent" in light of the new reproductive technologies, see, e.g., Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261 (1994); John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie MaGuire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

[2] Indeed, in one prominent decision, the court explained "the determination of parentage must precede, and should not be dictated by, eventual custody decisions." Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993). Nonetheless, the issues are far more complex because parentage does generally determine custody. In fact, in *Johnson*, the two individuals who were defined as the "parents" received custody. *See id.* at 787.

can receive custody; in turn, the parental rights determination reveals the indeterminacy and social construction of the concept of parent.

When the nuclear family dissolves, the custodial rights of parents are generally determined by their status as mother and father. There is a strong societal and legal presumption that the parents are fit and proper custodians for children and that they will act in their children's best interests.[3] A third party typically must prove the unfitness of both parents before being granted custody. The rights of parents are thus much stronger than those of nonparents, and so a determination of parentage purchases all of those rights, while severing the rights of others.

In response to the increasing number of custody disputes between parents and nonparents, the clear dichotomy between the rights of parents and the rights of third parties against parents is dissolving. This dichotomy is breaking down in two distinct and somewhat conflicting ways when there are multiple adults seeking custody. First, courts have expanded the definition of parent to include third parties, often without a biological connection to the child. At the same time, courts have struggled to find only two persons entitled to the exclusive rights associated with parental status. This has occurred in cases concerning surrogate mothers and unwed fathers. Second, without expanding the number of adults defined as parents, courts and legislatures are beginning to diminish the exclusive rights of parental status by increasing the number of people to whom the best interest standard applies, as has occurred in the adoption area.[4]

What unifies these cases is the legal system's efforts to define the parents of any particular child and the effect of this decision on child custody determinations. Throughout these cases, courts are struggling to determine child custody by manipulating the rights of parents.

This Article explores how disputes are resolved when a party, aside from a grandparent or other relative,[5] with a colorable claim to parental status seeks

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[3] This is certainly true within the marital unit.

[4] Consequently, the best interest of the child standard, which originated in disputes between the two natural (or adoptive) parents, is sometimes extended beyond these situations to resolve other types of cases which arise between biological parents and other types of parents. It is somewhat difficult to determine whether these new applications of the best interest standard, when they are made within the existing paradigm of parental rights without a critical examination of that paradigm, actually benefit the child. In the adoption context, the standard may disadvantage the biological parent who is not involved in a traditional family relationship. Further, it may benefit the child by respecting her relationship with those outside of her biological family. *See, e.g.*, Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 694 (1993) (explaining that in their attempts to preserve the form of traditional families, courts may be willing to overlook biological facts).

[5] For a discussion of their rights, see Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994)

custody regardless of a finding as to the fitness of the biological parent(s).[6] It examines the interaction of parental status with the best interest of the child standard and shows how custody decisionmaking must be recognized as a two-step process: the first step is defining and identifying the parent(s), and the second step is determining the child's best interests. These two steps are implicit and obscured in the conventional divorce situation, where a husband and wife who are presumed to be the parents must resolve child custody; and the two steps are often conflated in any other type of custody proceeding.

Separating out these two implicit strands reveals the assumptions that underlie child custody decisionmaking. By exploring how, outside of the conventional divorce situation, manipulation of the concept of parent interacts with the best interest standard, we can see how the parentage determination affects custody outcomes. It is when the legal system must decide between several competing parties who claim parental status, such as the surrogacy, adoption, and unwed father cases, that attitudes about the appropriate parental roles become visible. Fundamentally, these decisions show the inevitability of tensions between the rights of parents and children, between nature and nurture, and between relationships and rights. Part II of this Article discusses how the law has defined parental rights, showing the historically contingent and different meanings of "parent." It also examines the related issues of custody decisionmaking between parents and third parties and some of the problems associated with the best interest standard. Part III surveys several of the new situations in which the need to redefine parent has arisen, examining cases involving adoption, "traditional" gestational and "nontraditional" genetic surrogacy, and unwed fathers. Part IV turns to an analysis of the effects on parents' and children's rights of the malleability, and consequent indeterminacy, of the concept of parent. Part IV also reviews several solutions that have been

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[hereinafter Czapanskiy, *Grandparents*]; Karen Czapanskiy, *Babies, Parents, and Grandparents: A Story in Two Cases*, 1 AM. U. J. GENDER & L. 85 (1993) [hereinafter Czapanskiy, *Babies*]. Even the grandparent visitation statutes discussed by Professor Czapanskiy generally deny the rights of grandparents to seek visitation orders against an intact married family, although this is changing. *See* Czapanskiy, *Grandparents*, *supra*, at 1331 n.66.

[6] I will refer throughout this paper to the biological rather than the "natural" parents. Virtually all of the situations in which the issues that I discuss arise are between parents with some biological connection (ranging from gestational and genetic parent to gestational *or* genetic parent) or between such a parent and a party without such a connection. In a recent article, Professor Carolyn Kaas labels "child custody disputes between a biological or legally adoptive parent and anyone else who is neither" as "'third-party' custody cases." Carolyn W. Kaas, *Breaking Up a Family on Putting it Back Together Again: Refining the Preference in Favor of Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1047 (1996).

suggested as a means of defining the parent(s) and determining the appropriate custodian of the child. Because these solutions focus only on the first step of defining "parent," they generally do not address the interrelated issues of the child's interests.[7]

In Part V, I argue that we must acknowledge whose interests are being protected and whose disadvantaged when we redefine the meaning of "parent" and apply the best interest standard. There needs to be a more explicit recognition of all parties' rights, responsibilities, and emotional attachments, together with a speedy determination of all such disputes, in order to resolve appropriately custody disputes. Under contemporary approaches to child custody decisionmaking, the decision of who qualifies as a parent clearly affects the outcome of the application of the best interest of the child standard. Although the rhetoric remains centered on the child, the focus in child custody decisionmaking is, in actuality, displaced from the child's best interests to the parents' rights.

Ultimately, this Article suggests that once we admit that the child's best interest is defined in the context of the identity of the parents, against a background of strong socially-held assumptions about parental rights to the custody of their children, we will have a better understanding of how to resolve these cases. The Article argues for separate consideration of the rights of parents and the rights of children rather than the existing system under which we consider the rights of parents under the (dis)guise of the best interests of the child. This Article then suggests a two-step process for making decisions about children: the first stage consists of a determination of the identity of the parents, while the second stage involves a resolution of the child's best interests. This first stage, which might in appropriate situations require the recognition of multiple "parents" based on biology and affinity,[8] is significant because it explicitly accords rights to adults independent of the child's interests. The first stage provides the framework for the second stage, which in turn requires a determination of how, within the context of the number of interested adults, to make a decision that best serves the child.[9]

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[7] It is, and should be, difficult to separate out the two steps. *See* June Carbone, *Child Custody and the Best Interests of Children*, 29 FAM. L.Q. 721, 736–37 (1995) (book review) (identifying three obstacles to separating out parents' and children's interests).

[8] *See infra* note 165. As discussed later, resistance to the concept of multiple parents may be based on an ideology which requires one parent of each sex for a child, or on theories of the development of infant attachment. *See infra* note 200.

[9] Best serving the child's interests could range from providing her with independent representation in all contested custody-related proceedings to judicially reviewing an agreement promulgated by the parents. *See generally* Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571,

While the redefinition of "parent" occurs in a small number of cases, including contested adoptions, surrogacy agreements that disintegrate, and some unwed father paternity suits, it reveals cultural assumptions about the meaning(s) of parenthood, showing how parenthood is a culturally constructed institution, and how custody is dependent on the identity of the parents. If, both within and outside conventional custody situations, the legal system attempts to recognize and separate out the interests of the parents and those of the children, then we can hope for better outcomes for the children.

II. PARENTAL RIGHTS, THE RIGHTS OF THIRD PARTIES, AND THE BEST INTERESTS OF THE CHILD

Historically, gender and marital status have been the critical factors in determining parental rights. Married parents had virtually absolute child custody rights against anyone who sought to interfere with them, while unmarried parents had less determinate rights. Until the early nineteenth century, in the rare event that married couples separated, the father was entitled to custody of the children because they were his "property." By the late nineteenth century, the mother was seen as the proper custodian. Today, when married or unmarried parents separate, both parents have equal rights to custody under a best interest of the child standard, while third parties are subject to a different standard in order to receive custody. The best interest standard thus appears in two contexts: it is assumed that it is in the child's best interest for a parent to receive custody, and in disputes between parents, the same standard determines which of the parents will become the custodian.

This section discusses the changing nature of parental rights and contrasts the rights of parents with those of third parties. This section further shows the value and constructed nature of "true parental rights," demonstrating that marriage, sex, and race affects the bundle of rights accorded to parents.[10]

1583–84, 1583 n.59 (1996). The best method for serving the child's interests will undoubtedly be situation-specific.

[10] *Cf.* MICHAEL FOUCAULT, POWER/KNOWLEDGE 131–32 (Colin Gordon ed., 1980); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (showing the constructed nature of childhood). Carol Sanger notes that "what motherhood means—as an icon, or institution, a role or a status—is no longer certain. . . . Even a simple question like who *is* a mother no longer has simple answers, now that genetic contributions, gestation, and stroller pushing may each be provided by a different woman." Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 18 (1992). Interestingly enough, the concept of "child" is less complicated; the complexity appears when we determine *whose* child she is.

A. *Custody Disputes Between Parents: The Child's Best Interests*

The right of married parents to the custody and control of their children has been a fundamental tenet of the American legal system.[11] When it came to intraparental disputes between married individuals, nineteenth century courts "seesaw[ed between] the traditional common law rights of father and the natural rights claim of the mother[;]"[12] when the parents were unmarried, the father had virtually no rights. Today, most states use a best interest of the child standard to determine custody rights between both married and unmarried parents. While this standard has been subject to numerous criticisms, it remains the almost universal method for ensuring that legal decisionmakers consider children's interests in intraparental conflicts.

1. *The Value and Meanings of Parental Rights*

At common law, parental rights were both "exclusive and indivisible,"[13] at least with respect to marital children. Moreover, these rights were unalienable and inviolable.[14] They belonged to the biological mother and father of children, so long as they were married. Marriage, which was critically important because it served as "'the foundation of the family and society,'" guaranteed parental rights.[15]

When the biological parents were not married to each other, the law differed with respect to the bundle of rights that attached to parenthood and the individuals who were accorded parental status. At English common law and in colonial America, nonmarital children had no legally recognized relationship

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[11] *See generally* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

[12] MASON, *supra* note 11, at 61.

[13] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883 (1984). As Nancy Polikoff explains, "Customarily, legal parenthood is an all-or-nothing status. A parent has all of the obligations of parenthood and all of the rights; a nonparent has none of the obligations and none of the rights." Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990).

[14] *See* Jaimal S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1042 (1979). For a discussion of adoption, see *infra* notes 66–86 and accompanying text.

[15] *See* GROSSBERG, *supra* note 11, at 18 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)) (summarizing the status of marriage during the Republican era).

with either biological parent, and the parents had no recognized familial relationship with the child.[16] Not until the end of the nineteenth century did most states enact laws recognizing that "illegitimate" children were part of their mothers' families.[17] Black slave children were treated like "illegitimate" children, in that their social status derived from their mothers, and their fathers had no parental rights.[18] And, until the Supreme Court's 1972 decision in *Stanley v. Illinois*, the majority of states had laws under which fathers of nonmarital children had few rights with respect to custody or consent to adoption (although they did have support obligations).[19] Unless they had

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[16] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *459 (William C. Jones ed. 1916); GROSSBERG, *supra* note 11, at 197; 2 JAMES KENT, COMMENTARIES ON AMERICA LAW *212 (13th ed. 1884); MASON, *supra* note 11, at 24–25. *But see* GROSSBERG, *supra* note 11, at 198 (finding that under the Elizabethan Poor Law of 1576, the parents of an illegitimate child became responsible for her upbringing); JACOBUS TENBROEK, FAMILY LAW AND THE POOR 31 (Joel F. Handler ed. 1971). *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971). Thus, parents may have had an economic responsibility without a corresponding social responsibility. Parenthood was thus split between economic and social aspects.

[17] *See* MASON, *supra* note 11, at 68. The term "illegitimate" connotes various negative stereotypes about the status of nonmarital children; in light of changing social and legal attitudes towards these children, it is useful only in an historical sense to remind us of those stereotypes.

[18] *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 225–27, 250 & n.168 (1995). In Virginia, all African-American children derived their status from their mothers. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 *passim* (1989).

[19] In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held unconstitutional an Illinois statute pursuant to which unwed fathers were not defined as "parents." *See id.* at 646, 658. *Stanley* was decided within a year of when *Roe v. Wade*, 410 U.S. 113 (1973), was first argued. The Court expanded unwed fathers' rights at the same time as it considered women's rights to autonomy in the childbearing context. Not until 1973 did the Court hold that unmarried fathers had a constitutional obligation to support their children. *See* Gomez v. Perez, 409 U.S. 535 (1973).

For a discussion of the rights of unwed fathers, see W. J. Dunn, Annotation, *Necessity of Securing Consent of Parents of Illegitimate Child to Its Adoption*, 51 A.L.R. 2d 497, 503–14 (1957 & Supp. 1987, 1996); *see also* Norma G. Tabler, Jr., *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 231–33, 245 (1971) (stating that generally an unwed father had no rights to visitation without consent of the custodial mother and no right to consent to adoption); Benjamin G. Reeves, Comment, *Protecting the Putative Father's Rights after* Stanley v. Illinois*: Problems in Implementation*, 13 J. FAM. L. 115, 116–17 (1973–74) (noting that historically, notwithstanding the doctrine of *nullius filius*, the unwed father was legally required to support the child); Frederick C. Schafrick, Comment, *The Emerging Constitutional Protection of the*

"legitimated" their children, fathers were not allowed to exercise parental powers; in effect, they were defined as nonparents.[20]

Even with respect to marital children, however, in the context of intraparental disputes, the rights of mothers and fathers and the meaning of parenthood has differed. During marriage, the husband had virtually complete authority over all members of his household.[21] At divorce, prior to the early nineteenth century, the child was considered the property of the father and the father was entitled to all of the child's earnings.[22] Over the course of the nineteenth century, however, the focus shifted from children as property to an examination of the best interest of the child as a standard for awarding custody.[23] Until the middle of this century, the best interest of young children was closely identified with maternal custody pursuant to the so-called "tender years presumption."[24] The tender years presumption developed during an era when women were seen as responsible for guarding and maintaining a domestic

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Putative Father's Parental Rights, 70 MICH. L. REV. 1581, 1584 (1972) (noting that an unwed father was not usually entitled to consent to adoption, nor even to notice of proceedings).

[20] For a defense of this assumption, see Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 499 (1983). The cultural image of unwed fathers assumed they were irresponsible. *See* Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 979 (1994); Mary K. Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 587, 595 (1991).

[21] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 269 (1990) (noting that a husband had "powers over the property and services of his wife and children, including the power to discipline them"). *See generally* Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

[22] *See* GROSSBERG, *supra* note 11, at 237–42; MASON, *supra* note 11, at xiii, 61–62.

[23] While this outline of the historical development of custody law is generally accurate, it does neglect "the overlapping images, turmoil, and inner contradictions of family culture and family law," including the contested meanings of the child's best interests. *See* Barbara B. Woodhouse, *Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1039–40 (1992). As Professor Woodhouse points out, the conflict between notions of children as parental property and children as individuals continues today. *See id.* at 1121. *See supra* note 11 for further discussion.

[24] *See* GROSSBERG, *supra* note 11, at 239–40; *see also* Mary E. Becker, *The Rights of Unwed Parents: Feminist Approaches*, 1989 SOC. SERV. REV. 496 (detailing a brief history of the rights of married and unmarried parents). One of the earliest articulations of the tender years presumption was in *Helms v. Franciscus*, 2 BLAND CH. (Md.) 544, 563 (1832).

sphere, while men were viewed as active in the public sphere.[25] Consequently, the married father was somewhat disadvantaged with respect to child custody of younger children after divorce, although he was entitled to visitation and he could block an adoption.

Historically, the exclusive and indivisible rights of parents have varied depending on gender and marriage. Today, married parents have equal rights to the custody of their children, although these rights become most visible and are often readjusted at divorce when courts decide custody and set child support awards. Outside of marriage, paternal rights have shifted with states recognizing the ability of unwed fathers to establish parental relationships with their children through a variety of mechanisms.[26] While maternal rights to nonmarital children have become less exclusive as the rights of unwed fathers have expanded, mothers continue to have a strong legally recognized relationship with their children.

2. *Determining Custody*

a. *Application of the Best Interest Standard*

When it comes to custody determinations between the two biological parents, courts in virtually every state are charged by statute with determining the custodial situation that will be in the child's best interests. There is an underlying assumption in most jurisdictions that an award to a biological parent will be in the child's best interests.[27] Thus, underlying usage of the best interest

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[25] For a discussion of the private/public sphere ideology, particularly as it applied to white New Englanders, see NANCY COTT, THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780–1835 (1977). For a similar discussion with respect to black women, see HAZEL V. CARBY, RECONSTRUCTING WOMANHOOD (1987).

The tender years presumption was repeatedly challenged as discriminatory, and held unconstitutional, beginning in the mid-1970s. *See, e.g.*, *Ex parte* Devine, 398 So. 2d 686, 695–96 (Ala. 1981); Bazemore v. Davis, 394 A.2d 1377, 1380–83 (D.C. 1978).

[26] *See, e.g.*, UNIF. PARENTAGE ACT § 4 (Presumption of Paternity), 9B U.L.A. 287, 298 (1987 & Supp. 1996). Where the unwed father has not established a substantial relationship with his child, he may not have any parental rights. *See infra* Part III.C. Thus, paternal rights may differ dramatically depending on the father's relationship with the child. For example, California differentiates between presumed fathers and biological fathers. *See* CAL. FAM. CODE § 7611(a) (West Supp. 1996). The Supreme Court has never addressed the rights of the unwed father with respect to an infant whom the mother seeks to relinquish for adoption.

[27] *See, e.g.*, Ross v. Hoffman, 372 A.2d 582, 587 (Md. 1977); S.M. v. A.W., 656 A.2d 841, 844 (N.J. Super. Ct. App. Div. 1995); Montgomery v. Roudez, 509 N.E.2d 499, 502 (Ill. App. Ct. 1987).

of the child is a presumption of the fitness of either biological parent to act as the custodian. For sole custody, the legal system is simply deciding who is, in some sense, more fit and better for the child to live with, and there is a strong presumption of liberal visitation rights for the other parent. When the best interest of the child standard is used, there is no legal presumption as to which parent would be better,[28] and either parent may receive custody without proving his or her fitness to do so. That is, as a threshold matter, a parent need not prove her fitness as a custodian, although the other parent may prove that he will be a better custodian. With respect to joint custody, the decision is that both parents are appropriate, and the courts must simply decide on how to allocate physical and legal custody between them.[29]

To decide between the two parents, the best interest of the child standard generally requires judges to balance a series of factors which are often listed in the statute. Among the factors to be considered pursuant to the Uniform Marriage and Divorce Act ("UMDA") are the parents' wishes and the child's interactions with other significant persons.[30] Unlike the parents' wishes, the

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For a somewhat outdated analysis of the strength to be accorded parental rights in each jurisdiction, see Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986).

The Uniform Marriage and Divorce Act, which sets out a best interest standard for custody decisions, explains that the standard preserves "familiar presumptions," such as a parent being "usually preferred to a nonparent." UNIF. MARRIAGE AND DIVORCE ACT § 402 cmt., 9A U.L.A. 561 (1987).

[28] In practice, women are, of course, more likely to receive custody when it is unopposed. When fathers seek custody, however, the data are contested concerning whether fathers are more or less likely than mothers to receive it. *See, e.g.*, ELEANOR MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 113 (1992) (citing a California study, where parents seek conflicting outcomes, "mothers succeed twice as often as fathers in securing their preferred outcome"); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 121 (arguing that a man has a better than equal chance of obtaining custody); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236 (1982) (discussing the differing statistics). While the standard in practice differs from its theory, there is no explicit presumption for either parent.

[29] Joint custody can take many forms, ranging from fully shared legal and physical custody where both parents are jointly responsible for making significant child-rearing decisions and are involved in the daily activities of the child, to shared legal or physical custody. For a further discussion, see MACCOBY & MNOOKIN, *supra* note 28; JOINT CUSTODY AND SHARED PARENTING (Jay Folberg ed., 2d ed., 1991).

[30] *See* UNIF. MARRIAGE AND DIVORCE ACT § 402 (1), (3), 9A U.L.A. 561 (1987); *see also* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219 (1991) (discussing as typical the factors in

wishes of the significant persons are irrelevant, at least pursuant to the statute, thereby reinforcing parental rights.[31]

Even statutes which seem to accord rights to nonparents where there is an intraparental custody dispute, still accord parents the strongest of rights. For example, the Texas courts must appoint a "conservator" to care for the child.[32] A parent will be appointed as conservator unless "the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development."[33] From this phrasing, it might appear that a third person could obtain custody simply by showing that it is not in the child's best interests to stay with her parents. But, the appointment of the parent must have a significant negative effect on the child before the third party will be considered. Such effects go far beyond a mere finding relating to the child's best interests and reinforce the strength of the parents' rights.

Determining the child's best interest in a contested custody dispute may involve lengthy expert testimony together with disputed evidence from the parties; the child may also be called as a witness. It is a time-consuming and often agonizing process because the judge has so much discretion in formulating the decision.[34]

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the UMDA). Recently, states have also begun to include domestic violence in the list of factors. *See* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); *Developments in the Law, Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1603-06 (1993).

[31] The visitation provision only discusses the rights of parents not granted child custody. *See* UNIF. MARRIAGE AND DIVORCE ACT § 407, 9A U.L.A. 612 (1987). Again, the rights of third parties are not even considered.

[32] *See* TEX. FAM. CODE ANN. § 153.005 (West 1996).

[33] *See id.* at § 151.131. A court can appoint a nonparent as conservator if the parent has voluntarily relinquished control of the child *and* the nonparent's appointment would be in the child's best interest. *See id.* at § 153.373. Here, while the phrase "best interest" is used, it is not applicable until the child is out of the parents' control.

The Montana Supreme Court struck down an amendment to the UMDA which would have granted a nonadoptive step-parent the right to request and receive custody when the custodial parent died because it interfered with a parent's constitutional right to custody. *See In re* A.R.A., 919 P.2d 388, 392 (Mont. 1996).

[34] For an insight into one family court judge's decisionmaking methods, see Jan Hoffman, *Judge Hayden's Family Values*, N.Y. TIMES, Oct. 15, 1995, § 6 (Magazine), at 44.

b. *Criticisms of the Best Interest Standard*

Over the years, the best interest standard has been subjected to continuous criticism.[35] The best-known analysis of the standard is Robert Mnookin's "indeterminacy" critique.[36] Twenty years ago, he argued that our inability to make predictions about what custodial situation would be in the child's best interests and to determine what set of social values should guide judicial discretion exposed the indeterminacy inherent in the standard.[37] For example, Professor Mnookin notes that judges are entrusted with discretion but they often, if not always, lack the requisite information with which to make a custody determination: they do not know enough about the parties' past relationship to make predictions about the future custodial situation.[38] Professor Mnookin ultimately concludes that even if the best interest standard results in random decisionmaking, it nonetheless serves values such as expressing concern for the child.[39] Thus, notwithstanding the flaws of the best interest standard, Professor Mnookin respects its symbolism.

Others are even harsher in their critique of the best interest standard. Feminist critiques center on the many different ways in which the standard disadvantages women.[40] Some feminists have argued not only that the best interest standard favors men because it does not recognize the contributions of women as primary caretaker but also that it cedes too much control to experts.[41] Professor Mary Becker, who advocates a maternal deference

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[35] It is not my goal to repeat many of these criticisms. For a concise summary of the arguments against judicial discretion in custody decisionmaking, see Schneider, *supra* note 30, at 2219.

[36] *See* Robert Mnookin, *Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

[37] *See id.*

[38] *See id.* at 257.

[39] *See* Mnookin, *supra* note 36, at 291; *see also* Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 13–14 (1987) (suggesting randomized custody decisionmaking); *cf.* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488 (1984) (noting that the concept of children's best interests "has no objective content").

[40] *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 869–70 (1990) (noting that feminists ask "the woman question").

[41] *See, e.g.*, MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 85–94 (1991); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992); Martha A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) [hereinafter Fineman, *Dominant Discourse*].

standard,[42] argues that the best interest standard is "systematically biased against mothers" in several different ways.[43] She notes "six common biases: (a) against a sexually active mother, (b) against a mother with less money than the father, (c) against a working mother, (d) against a lesbian mother, (e) against a mother involved in an interracial marriage, and (f) in favor of a remarried father."[44] Moreover, Professor Becker argues that the best interest of the child standard does not adequately recognize the emotional closeness and intimacy between a mother and her child.[45]

Professor Martha Fineman criticizes the standard from a different perspective. She believes that it allows social workers to pre-empt lawyers and impose their own misogynistic biases on the custodial outcomes. Consequently, she argues women are, again, disadvantaged because their custodial claims are not treated seriously.[46] In addition, Professor Fineman argues that the best interest test is applied acontextually, within a no-fault degendered divorce scheme which fails to consider the experiences of mothers as primary caretakers.[47]

As a result of these critiques, legal scholars and activists have developed alternative standards such as presumptions for joint custody or for the primary caretaker. Both of these are generally justified by reference to the child's best

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[42] The maternal deference standard appears similar to the older "tender years presumption"; it is different, however, both because its proponents ground it in positive images of women as well as because it attempts to recognize the reality that mothers generally continue to provide primary care to children. *See* Becker, *supra* note 41, at 203.

[43] *See id.*

[44] *Id.* Some of Professor Becker's criticisms of the biases of the best interests standard apply, of course, to fathers; for example, a father who is gay or who is in an interracial relationship may also experience discrimination.

[45] *See id.*

[46] There are at least three other critiques of the best interest standard. First, some suggest that because of the seeming neutrality of the standard, the party seeking custody (generally the mother) will unnecessarily relinquish other rights so that she can have custody. *See* Cahn, *supra* note 30, at 1041; Jana Singer & William Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 503, 515–17 (1988). A second critique of the standard suggests that it is only the parents' not the child's interests that are actually considered. "[T]he 'best interests' of any particular child always yield to the constitutional claims of their parents. . . . [P]arents who refuse to support their children and even abusive parents retain their constitutional visitation rights, enforceable against the child's will and regardless of the child's 'best interests.'" Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 60 (1994). A third critique is that the best interest standard does not reflect parental preferences, nor accurately predict the actual future custodial arrangement. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 619–30 (1992).

[47] *See* Fineman, *Dominant Discourse*, *supra* note 41, at 768–69.

interests.[48] More radical proposals have questioned the utility of attempting to determine the child's best interests, suggesting for example, that the child be allowed to speak for herself or that courts simply replicate the custodial situation that existed prior to the divorce.[49]

Nonetheless, the best interest standard is still the standard in forty-nine states and the District of Columbia, and even the alternative standards such as the primary caretaker,[50] are justified by reference to it. Its rhetoric is appealing, perhaps even irresistible. As one commentator points out, "using the phrase in a ruling on a child custody dispute comes as naturally to a state court judge as breathing."[51]

B. *Third Party Custody Standards*

If a third party seeks custody, there is another layer of legal hurdles that precedes an analysis of the best interests of the child.[52] Traditionally, the third party has been required to prove the unfitness of the natural parents before attempting to establish any rights to the child. Third parties typically have

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[48] For example, the District of Columbia recently enacted the Joint Custody of Children Act of 1996 which provides: "There shall be a rebuttable presumption that joint custody is in the best interest of the child." D.C. CODE ANN. § 16-911(a)(5) (1996).

[49] *See infra* Part IV for further discussion of alternatives to the child's best interests. For advocacy of children's representation, see Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523 (1994). For a discussion on the proportionality proposal, see Scott, *supra* note 46.

[50] The best known articulation of the primary caretaker standard is in *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

[51] Jeanne L. Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 616–17 (1994).

For Native American children, the presumptions with respect to the best interest of the child may differ. The purpose of the Indian Child Welfare Act "includes *both* the protection of 'the best interests of Indian children' and the promotion of 'the stability and security of Indian tribes and families.'" Barbara A. Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1058 (1989) (quoting 25 U.S.C. § 1902 (1988) (Congressional Declaration of Policy)). Again, this shows the alternatives to our current structure for child custody decisionmaking.

[52] *See, e.g.*, CAL. FAM. CODE § 3041 (West 1994) (finding that a court must find that award to a parent would be "detrimental to the child"); Locklin v. Duka, 929 P.2d 930, 934–35 (Nev. 1996) (holding that, even where grandpparents were appointed as guardians for seven years and where mother retained only a sporadic contact with child over a five period, mother is proper custodian because of "'parental preference' presumption."); *see also* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1215 nn.27–28 (1994) (collecting cases and statutes setting out the presumption of the fitness of the natural parent).

established their rights through an adoption proceeding, rather than through custody cases.[53] Indeed, at least one court claims a constitutional basis to the parental rights doctrine grounded in *Meyer v. Nebraska*,[54] *Pierce v. Society of Sisters*,[55] and related cases.[56] Thus, children may only be adopted by third parties once their parents' rights have been terminated either voluntarily or through a finding of unfitness.[57] Until the parent's unfitness has been shown, there is a presumption that she will win any custody case against any nonparent.[58] The fitness standard protects the rights of biological parents by placing a formidable burden on third parties. The presumptions pursuant to a best interest standard favor neither parent with respect to a third party; pursuant to a fitness standard, the presumption runs in favor of either parent vis-à-vis a

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[53] Generally, the rights of the biological parents must be terminated before a child is available for adoption. It has typically been difficult, although not impossible, for third parties to defeat the custody claims of the biological parents outside of the adoption area.

Guardianship proceedings are another method for establishing caretaking rights. *See* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 711–12 (3d ed. 1995); *see also* Czapanskiy, *Grandparents*, *supra* note 5 *passim*.

[54] 262 U.S. 390, 390–91 (1923) (holding that a statute which prohibits the teaching of modern language unconstitutionally interferes with a parent's right to direct the upbringing and education of their children).

[55] 268 U.S. 510, 534–35 (1925) (holding that requiring children to attend public schools unconstitutionally interferes with a parent's right to direct the upbringing and education of their children).

[56] *See* Brooks v. Parkerson, 454 S.E.2d 769, 773–74 (Ga. 1995) (holding unconstitutional a state statute allowing for grandparent visitation rights because of interference with parental rights to raise their children without undue state interference); *see also* Hawk v. Hawk, 855 S.W.2d 573, 577–79 (Tenn. 1993) (same analysis under state constitution). *But see* Haynie, *supra* note 27, at 736–37 (claiming parental-rights doctrine is unconstitutional based on the unwed fathers' cases).

[57] When a state seeks to terminate parental rights, there must be clear and convincing evidence of the unfitness. *See* Santosky v. Kramer, 455 U.S. 745, 768–70 (1982).

[58] In *In re* H.S.H.-K., 533 N.W.2d 419, 422 (Wis. 1995), a lesbian coparent petitioned for custody of the biological child of her former lover. The Wisconsin Supreme Court held that, unless she was proven to be unfit, the rights of the biological parent were superior to those of a third party. *See id.* at 424.

While some jurisdictions allow adoptions to proceed if a parent is withholding consent contrary to the child's best interests, *see, e.g.*, D.C. CODE ANN. § 16-304(e) (1981), the standards are generally interpreted far more strictly than a simple best interest test. For example, in Washington, D.C., the third party must prove by clear and convincing evidence that allowing the adoption to proceed is in the child's best interest. *See In re* J.S.R., 374 A.2d 860, 864 (D.C. 1977). This is in accord with the Supreme Court's *Santosky*, 455 U.S. at 745, and *Quilloin v. Walcott*, 434 U.S. 246 (1978), decisions.

third party. For example, even when the father has shot the mother, courts may award the children to him over a third party because of his rights as the biological parent.[59] Under the UMDA, a nonparent cannot sue for custody if a parent has physical custody.[60] The explanatory comments note that this section was "devised to protect the 'parental rights' of custodial parents and to insure that intrusions upon those rights will occur only when" the parents are abusing or neglecting their children.[61]

While some of the best interest standards appear to apply to third parties as discussed above, the actual statutory and judicial language continues to place a higher burden on third parties than on the parents. As an example, consider the recently decided case of *Rowles v. Rowles* in which the Pennsylvania Supreme Court eliminated, "'the presumption per se'" in favor of parents.[62] A mother sought custody of her two young children, each of whom had spent the majority of their lives with their paternal grandparents.[63] Both the trial and appellate courts, which used the presumption in favor of parents over third parties, nonetheless awarded custody to the grandparents. The Supreme Court abolished the presumption and awarded custody to the mother. The court recognized that "the parental relationship is by far the most weighty factor in the custody determination" and that there is "absolutely nothing in the record which casts doubt on the expectation that [the mother] bears normal human solicitude, care, devotion, and love for her offspring."[64] Even without the customary presumption, the mother received custody.

When someone who might otherwise be termed a third party seeks custody, it is thus clearly preferable to be deemed a parent than a nonparent. As a parent, she will be proceeding pursuant to the best interest of the child standard, rather than being required not only to prove the unfitness of the parents, but

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[59] *See, e.g.*, Walker v. Fagg, 400 S.E.2d 208 (Va. Ct. App. 1991) (discussed in Bottoms v. Bottoms: *Erasing the Presumption Favoring a Natural Parent over Third Parties—What Makes this Mother Unfit?*, 2 GEO. MASON IND. L. REV. 457, 463–64 (1994)); *In re* Lutgen, 532 N.E.2d 976 (Ill. App. Ct. 1988).

[60] *See* UNIF. MARRIAGE AND DIVORCE ACT, § 401(d)(2), 9A U.L.A. 550 (1987).

[61] *See id.* at § 401 cmt.

[62] Rowles v. Rowles, 668 A.2d 126, 128 (Pa. 1995) (quoting Ellerbe v. Hooks, 490 Pa. 363, 374 (1980) (Flaherty, J., concurring)).

[63] The parents moved in with the paternal grandparents when their older child was almost two. When the younger child was two months old, the parents moved out, leaving both children with the grandparents. *Rowles*, 668 A.2d at 127. Although cases involving relatives seeking custody are generally beyond the scope of this Article, *Rowles* provides an excellent example of the rhetoric that surrounds pronouncements about the end of the parental presumption. For some of the special concerns raised by grandparent cases, see Czapanskiy, *Grandparents*, *supra* note 5.

[64] *Rowles*, 668 A.2d at 130.

also to prove that it is in the best interest of the child to be placed with the third party. While the rights of parents against each other differ somewhat, there remains a strong legal presumption that they are the best custodians for their children and that their rights are stronger than those of any third party.

III. REDEFINING PARENT

When courts and legislatures have been presented with custody disputes outside of the conventional two-parent family, each has struggled to find the appropriate solution. Courts or legislatures have generally taken one of two approaches: they have either sought to redefine who the parent is so that there are two parents for each child, or they have analogized the situation to the more conventional two-parent families to which the best interest standard is applicable, even where there are more than two "parents."[65]

When, as in the surrogacy and unwed father cases, the parents did not have (or are unmarried and no longer have) an intimate relationship with each other, but each has a biological connection to the child, courts have sought to find only two parents for every child. By contrast, in the adoption context when there is no biological connection, courts have sometimes expanded the notion of parent so that there are multiple sets of parents. Thus, some courts are, on the one hand, changing the status of parents so that the bundle of rights associated with that status is changing, while others simply redefine who is entitled to the status of parents so that each child has only one mother and one father. In both types of cases, the change seems driven by an attempt to find a rationale according nonbiologically-related "parents" some rights to the child. The best interest of the child standard has no substantive content in either type of case. Where courts seek to find only two parents, they are acting on a general presumption that it is in the child's best interests to find two parents married to each other. Alternatively, when courts apply the best interest standard to choose among several sets of parents, they almost invariably grant custody to the nonbiological parents.

A. *Choosing Between Two Sets of Parents: Adoption*

Until Massachusetts enacted a statute to regulate adoption in 1851, adopters had virtually no rights if the biological parents returned for their child.[66] As

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[65] Robert Mnookin predicted, twenty years ago, "that trial courts may now use the best-interest-of-the-child standard and such new concepts as 'psychological parenthood' to reject the claims of a child's natural parents." Mnookin, *supra* note 36, at 226.

[66] *See* Janet H. Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 924 (1991); *see also* Zainaldin, *supra* note

attitudes towards adoption changed, adopters were able legally to formalize their new relationship with the child and, as discussed above, by the middle of the twentieth century they generally needed only the consent of the biological mother for an adoption.[67] Nonetheless, as the negative stigma of illegitimacy has begun to dissipate and as biological fathers have begun to assert their power, the rights of biological parents, especially fathers, are getting more attention and protection.[68]

Children are unavailable for adoption unless the rights of their biological parents have been legally terminated. Consequently, not only conflicting claims between people asserting parental rights but also the best interest of the child standard would seem to be completely irrelevant to adoption proceedings because there should be no competing claimants to the child.[69] If the biological

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14, at 1043–44. *See generally* Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

[67] Indeed, in 1956, my husband's biological mother never even named his biological father at any stage in the adoption proceedings. Requiring only maternal consent was consistent with the lack of legal recognition accorded to the unwed father's relationship with the child. *See supra* notes 16–20.

[68] *See, e.g.*, Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

Classifications based on illegitimacy are today subject to a constitutional standard of intermediate review. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Trimble v. Gordon, 430 U.S. 762 (1977).

[69] A state's regulation of adoption is often justified as based on the best interests of the child. *See* ADOPTION LAW AND PRACTICE app. § 1-A (Joan Hollinger et al., ed. 1989) (discussing adoption law in the fifty states). The prospective adoptive parents must be suitable and the adoption must be in the child's best interest. But the application of the child's best interests are only relevant after there has been a termination of parental rights and a child is available for adoption. *See id.*

A state cannot remove a child from her parents merely because the potential adoptive parents might be, in some sense, "better." *See* Joan H. Hollinger, *Adoption Law*, 3:1 FUTURE OF CHILDREN 43, 48 & n.22 (1993). Indeed, concern about the unwarranted removal of children from their homes into a "better" environment provides some justification for privileging biological parenthood. Without such a preference, parenting would be subject to race, class, and gender biases, and a market in babies would become more realistic. *See generally* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987). *See also* Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) (critiquing proposals that would commodify children). The child welfare movement has historically sought to impose middle-class values

parents block an adoption, then the child generally will be returned to them.[70] There is simply no issue as to whether it would be in the best interests of the child for her to remain with her biological parents, or for her to be adopted, because of the strong presumption that a child belongs with her biological parents.

And yet, a few states have struggled to develop approaches that redefine adoption disputes so that the best interest standard may become applicable to controversies that arise between the potential adoptive parents and the biological parents. Under one approach, the legal system may label the potential adoptive parents as "parents," entitled to all of the rights inherent in that status. Alternatively, under another approach, the law may simply provide that an adoption dispute between biological parents and the potential third-party adopters is subject to the child's best interests. In a recent Colorado case, *In re C.C.R.S.* ("*C.C.R.S.*"), the court defined the potential adoptive parents as the "psychological parents" because they had physical custody and had developed strong emotional bonds with the child.[71] The dispute thus became one between the "natural [sic] parent and psychological parents," to which the court held applicable the best interests of the child standard.[72] The court could use the

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on poor families. *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (1988).

[70] Dramatic recent examples include the *Baby Richard* and *Baby Jessica* cases, where children were very publicly returned to their biological parents. *See In re* Kirchner, 649 N.E.2d 324 (Ill. 1995) [hereinafter *Baby Richard*]; *In re* Clausen, 502 N.W.2d 649 (Mich. 1993) [hereinafter *Baby Jessica*]. *But see In re* E.A.W., 658 So. 2d 961 (Fla. 1995) [hereinafter *Baby Emily*]. Because this seems to be the current state of the law, adoptive parents are fighting it. Moreover, the proposed Uniform Adoption Act would dramatically change current law with respect to the rights of biological parents. *See infra* note 82.

[71] Indeed, in its first footnote, the Colorado Supreme Court noted that "T.A.M. and M.A.M., the psychological parents, are referred to hereinafter as the respondents." *In re* C.C.R.S., 892 P.2d 246, 248 n.1 (Colo. 1995), *cert. denied*, 116 S. Ct. 118 (1995).

The psychological parent theory is derived from the work of Joseph Goldstein, Anna Freud, and Albert J. Solnit, who claim that it is "the prototype of true human relationship." JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979); *see also* Carriere, *supra* note 51, at 618–25 (discussing use of psychological parent theory under the Indian Child Welfare Act); Peggy C. Davis, *"There is a Book Out . . . ": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1563–94 (1987).

[72] *See In re C.C.R.S.*, 892 P.2d at 248. The Colorado Supreme Court stated: "The overriding question at issue in this case is whether the best interests of the child standard, without a showing of parental unfitness, is the appropriate test for resolving a custodial dispute between a natural parent and psychological parents." *Id.*

The court did address the relationship between the presumption for natural parents, and custody awards to third parties by reviewing a line of Colorado cases in which custody had not been awarded to a fit natural parent. *See id.* at 256–57. Unlike the *C.C.R.S.* situation,

custody statute, rather than the adoption statute, to award custody to the potential adoptive parents over the natural mother.

C.C.R.S. arose after a natural mother, C.R.S., had placed her baby with the potential adoptive parents ("the 'Ms'") the day after he was born. C.R.S. sought to revoke her consent to relinquish custody slightly less than six months later. The 'Ms' then filed a petition for custody of the baby pursuant to the state's Uniform Dissolution of Marriage Act ("UDMA"), arguing that staying with them would be in the child's best interests. Under the UDMA, any person with "physical custody" of the child for six months could petition for custody.[73]

All three courts hearing *C.C.R.S.* agreed that the child's interests would best be served through a custody award to the 'Ms.'[74] They were able to use the best interest standard because they defined "physical custody" under the UDMA to include the potential adoptive parents with whom the child had lived. To reach this construction of physical custody, the Colorado courts looked to its legislative history and found that the Colorado General Assembly had recognized the significance of "psychological parents"[75] who might otherwise be considered nonparents.[76]

Each of the dissents in *C.C.R.S.* alleged that the courts were allowing the potential adoptive parents to circumvent the state's adoption procedures and consequently, the natural mother's rights had been violated.[77] The dissents argued for a return to the two-step analysis of determining parental fitness first, and then custody; without a finding of parental unfitness, the best interest of the child standard was inapplicable. They asserted that once the prospective

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however, each such case involved a family member with whom the child had resided for a significant period of time seeking custody. *See id.*

[73] *See* COLO. REV. STAT. ANN. § 14-10-123(1)(c) (West 1987). This provision can only be used when the child is not in the physical custody of either parent; if the child were in the parent's custody, then a third party would not have access to the best interest standard. *See In re* C.C.R.S., 872 P.2d 1337, 1341 (Colo. Ct. App. 1993), *aff'd*, 892 P.2d 246 (Colo. 1995).

[74] *See In re C.C.R.S.*, 892 P.2d at 258; *In re C.C.R.S.*, 872 P.2d at 1340, 1344; *In re* C.C.R.S., No. 90-DR-117 (Colo. Dist. Ct. Delta County May 26, 1992) (decision on file with author). The trial court awarded visitation to the biological mother. *See id.*

[75] *See, e.g., In re C.C.R.S.*, 872 P.2d at 1341.

[76] Indeed, throughout the opinions, the 'Ms' are variously called "non-parents" or the "psychological parents." *See e.g., In re C.C.R.S.*, 892 P.2d at 252; *In re C.C.R.S.*, 872 P.2d at 1342.

[77] *See In re C.C.R.S.*, 892 P.2d at 246–55, 260–62 (Lohr, J., dissenting); *In re C.C.R.S.*, 872 P.2d at 1345–55 (Taubman, J., dissenting). It is interesting to examine closely the language in the majority and dissenting opinions. For example, the appellate court noted that the mother had attempted to revoke her consent "nearly six months" after the child's placement, *id.* at 1339; the dissent noted that this had occurred "[l]ess than six months" later. *Id.* at 1345.

adoptive parents acquired physical custody, use of the best interest standard would make it very difficult for a natural parent to regain custody.[78]

The determination whether six months is too long—or too short—a time for a biological mother to be able to revoke her consent to an adoption[79] was not an issue that was squarely addressed by the appellate courts in *C.C.R.S.* Instead, the reasoning of the opinions in *C.C.R.S.* is based on an application of the best interest of the child standard rather than any discussion of the underlying policy issues. At a time of highly publicized revocation of consents to adoption,[80] the conflicts between the rights of the biological and adoptive parents in an adoption proceeding are hard to ignore. The opinions in *C.C.R.S.* evince a lack of self-consciousness about this issue. Indeed, the opinions carefully interpreted the UDMA to permit the custody action to go forward, rather than discuss the policies at issue in the choice to proceed under an adoption or a child-custody statute, as advocated by the dissenters.

The opinions also sidestep any constitutional issues with respect to the biological mother's rights. They distinguish the Supreme Court cases considering the rights of unwed fathers to establish relationships with their children on the basis that *C.C.R.S.* concerned only custody, not termination of parental rights, which would, they concede, require a showing of unfitness with a heightened standard of proof. They thus define (and arguably transform) a

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[78] *See, e.g., In re C.C.R.S.*, 892 P.2d at 259–60 (Lohr, J., dissenting). This issue generally arises in any contested adoption case. *See, e.g., Baby Jessica*, 502 N.W.2d 575, 649, 666–68 (Mich. 1993).

Courts are often reluctant to change physical custody. Moreover, it may be difficult for the biological mother to stay in touch with the child. Indeed, the *C.C.R.S.* majority disapprovingly noted that the biological mother had made "little effort" to maintain contact with her child. It also noted, however, that the trial court had found that this was difficult for the mother because of "the geographic distance between" her home and the child's home, and the biological mother's "limited financial resources." *In re C.C.R.S.*, 892 P.2d at 249 n.6.

[79] It may be too disruptive to the child to remove her at that point. *See* Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1845 nn.431, 434 (1993) (citing research concerning the formation of children's attachments). For the adoptive parents, it may also be a heart-wrenching process. Setting the time period during which a biological parent's consent to an adoption can be revoked is problematic because it counterpoises the rights of the biological parents, the adoptive parents, and the child.

[80] *See, e.g., Baby Jessica*, 502 N.W.2d at 642. The DeBoer Committee for Children's Rights filed an amicus brief before the Colorado Supreme Court in *C.C.R.S.* In *Baby Jessica*, the biological mother of Jessica DeBoer changed her mind about allowing her daughter to be adopted shortly after her parental rights had been terminated; Jessica was returned to her biological parents after she had lived with her potential adoptive parents for more than two years. *See id.* at 642; *see also* Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325, 325–26 (1994) (book review).

potential adoption case between the biological parent and third parties into a custody case where the dispute is between the parents. Consequently, to receive custody in *C.C.R.S.*, the adoptive parents are subject to the best interest of the child standard, not a standard resting on a showing of the natural mother's unfitness as would have happened in an adoption case. While it is unclear whether this was the appropriate resolution under the circumstances of this case, the court's solution nonetheless effectively circumvented the state's adoption law.

The Colorado Supreme Court is not unique in its approach to the rights of so-called psychological parents. Other states have awarded custody to certain categories of third parties without a finding of unfitness against the biological parents.[81] Rather than relabel the potential adoptive parents as "parents," another approach is simply to mandate that the best interest standard applies when a proposed adoption disintegrates. In a recent Illinois statute, when an adoption petition is unsuccessful, the court must make a custody determination based on the best interest of the child.[82] The parties are the potential adoptive parents, the biological parents with remaining parental rights, and the child.[83]

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[81] *See, e.g.*, Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992) (grandparents); Reflow v. Reflow, 545 P.2d 894 (Or. Ct. App. 1976) (aunt and uncle).

As in the precedents cited by the Colorado Supreme Court, however, third parties have generally been either blood relatives or the mother's new husband. While courts have not relied on consanguinity or affinity, and have used the power of the best interest of the child standard to explain their decisions to award custody to the nonparent, it is extremely rare for an unrelated third party to win such a case. The twin elements of physical custody and familial relationship serve to explain virtually all of the earlier decisions in which biological parents, who had not been proven unfit, lost custody.

[82] *See* ILL. ANN. STAT. CH. 750 ¶ 50/20a (Smith-Hurd Supp. 1996). This is similar to the approach under the Uniform Adoption Act, which states that if a petition for adoption is denied for certain reasons, then "the court shall determine the minor's custody according to the best interest of the minor." UNIF. ADOPTION ACT § 3-704 (1994); *see also id.* at §§ 2-408 to -409, 3-506.

In Maryland, a court can grant an adoption over the objection of the biological parent if, based on clear and convincing evidence, it is in the child's best interest to terminate the biological parent's rights. *See* MD. FAM. LAW CODE ANN. § 5-312(b) (1995). The statute also sets out additional requirements, such as the child's development of significant feelings towards the adoptive parents, before the termination can occur. *See id.* Notwithstanding the use of the child's best interests, however, there remains a presumption that the biological parent is best suited to care for the child which can be rebutted "by evidence of unfitness or exceptional circumstances." *In re* Adoption No. A91-71A, 640 A.2d 1085, 1096 (Md. 1994). The Maryland statute illustrates, once again, the importance of putting into context a state's use of the best interest standard when it comes to the rights of parents against third parties. *See* MD. FAM. LAW CODE ANN. § 5-312.

Such a statute grants rights to the different parents. Correspondingly, in some sense, the best interest standard pre-empts the decision as to who the parents actually are.

Naming additional sets of parents in the adoption context may be a good thing because it acknowledges that a child develops significant relationships to other adults.[84] When children have continuous contact with unrelated adults, they can develop strong attachments to them.[85] Focusing only on the child's interests, and not on the nature of the adults' connection to the child may be dangerous, however, if it is used to remove the child unjustly from the child biological parents.[86] This tension—between recognizing a child's significant relationship to nonbiologically-related adults, and respecting the rights of the biological parents—is at the core of why courts attempt to fit these cases under the best interest standard. Under the rubric of the best interest standard, courts attempt to recognize all relevant interests, although they too often fail to accord sufficient weight to any of them.

B. *Surrogacy*

In the surrogacy cases, courts generally assign parental status to two individuals, rather than, as is beginning to happen in adoption cases, expanding the number of people to whom a best interest analysis is applied. In the traditional surrogacy cases where the same woman is the genetic and gestational

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[83] *See* ILL. ANN. STAT. CH. 750 ¶ 50/20 (Smith-Hurd Supp. 1996). Others may be granted leave to intervene. *See id.*

[84] *See* Bartlett, *supra* note 13, at 902–11. In this ground-breaking article, Professor Bartlett discusses the importance of recognizing that children form significant relationships to adults other than their parents, and that when there are child custody disputes, these relationships need to be recognized. *See id.* at 902. Professor Bartlett limits her proposal to situations in which the child's relationship with her parents has been "interrupted." She further sets out criteria, such as a requirement that the nonparent has had physical custody of the child for six months, *see id.* at 946, a proposal which almost fits the situation in *C.C.R.S. See In re* C.C.R.S., 892 P.2d 246 (Colo. 1995).

[85] *See* Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 284 (1991).

[86] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX J. WOMEN & L. 75 (1993); Evan Stark, *Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1008–09 (1995); Michael R. Beeman, Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034, 1056 n.165 (1989).

Supporters of this approach would, of course, argue that they are focusing on the nature of the adults' connection to the child—they value the caretaker connection more than the biological connection.

mother, courts apply a best interest analysis to choose the two parents, although the intent of the parties is highly relevant. In the nontraditional surrogacy cases where one woman contributes the genetic material and another gestates that material, courts find only two "natural" parents.

1. *Choosing Between Two Biological Parents: Traditional Surrogacy*[87]

In the traditional surrogacy cases, courts have begun to apply a best interest analysis to determine which parent is entitled to custody. Rather than upholding the validity of the surrogacy contract and requiring the biological mother to relinquish all rights to her child, courts can reach a comparable result through a best interest analysis, even as they seemingly accord parental rights to the biological mother. Courts struggle to assimilate surrogacy into the confines of the two-parent family; and yet, the best interest analysis is inherently biased toward the married and intending parents.

Actually, in the surrogacy cases, disputes are between two biological parents, making them similar to the other situations to which the best interest standard has been applied. What is different, of course, is the context: instead of two biological parents who have had an intimate relationship with each other, the biological parents have entered into a contractual arrangement to create the child. The cases thus present an interesting mix, in Professor Janet Dolgin's words, of status and contract.[88] The contract between the two biological parents purchases them application of the best interest of the child standard, which is part of parental status, and helps courts treat the entire situation in a manner analogous to more traditional divorce cases.

In the most famous surrogacy case, *In re Baby M.*, the New Jersey Supreme Court declared that the parties' surrogacy contract was void pursuant to the state's public policy; the court thus was faced with a more traditional custody dispute between the two biological parents.[89] The lower court, also appealing to the child's best interests, enforced the surrogacy agreement and terminated the biological mother's parental rights.[90] The two opinions thus

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[87] "Traditional" surrogacy involves one woman acting as both the genetic and gestational mother. As discussed *infra* Part III.B.2, the new reproductive technologies enable the separation of the genetic and gestational aspects of motherhood.

[88] *See* Dolgin, *supra* note 1, at 1263; Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515 (1990). Professor Dolgin explains that status has the advantage of strong family relationships, while contract allows for new freedom to make reproductive choices. *See id.* at 524.

[89] *See In re* Baby M., 537 A.2d 1227, 1234 (N.J. 1988).

[90] *See In re* Baby M., 525 A.2d 1128, 1166–67, 1171 (N.J. Super. Ct. Ch. Div. 1987).

provide useful examples of how the definition of parent interacts with the best interest standard to affect surrogacy arrangements.

In *In re Baby M.*, the dispute was between Mary Beth Whitehead, the woman who had agreed to become pregnant through artificial insemination, carry the baby to term, and then relinquish the baby and her parental rights, and William Stern, the man whose sperm was used, and his wife, Elizabeth Stern.[91] After the baby's birth, Ms. Whitehead and her husband sought to keep the child, and the Sterns sought enforcement of the surrogacy contract.

The trial court judge began his opinion in *In re Baby M.* by articulating the court's role to protect the best interest of the child over the parents' rights.[92] He stated that "the primary issue to be determined by this litigation are what are the best interests" of Baby M.[93] He then upheld the surrogacy agreement against various challenges, primarily based in contract law, before turning to the issue of specific performance. The critical determination was whether "an order for specific performance would be in the child's best interest."[94] After considering the extensive evidence proffered as to the best custodial arrangement, the court held that specific performance was appropriate. And, since an order of specific performance pursuant to the contract would terminate the biological mother's parental rights, the court held that it had the right to terminate parental rights based on its independent, nonstatutory based "*parens patriae* power to determine the status of a child according to his or her best interests."[95]

In *In re Baby M.*, the lower court thus turned to the child's best interests as a way of both ordering specific performance of the surrogacy contract and terminating parental rights. The unfitness of the biological mother thus never became an issue due to the court's alleged independent power to act in *parens patriae* to terminate her parental rights pursuant to the contract. The contract

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[91] *See In re Baby M.*, 525 A.2d at 1143. The original surrogacy contract was between only Mr. Stern and Ms. Whitehead. *See id.*

[92] *See id.* at 1132–33. He traced the court's *parens patriae* responsibility for the child through early common law to contemporary New Jersey law. *See id.*

[93] *See id.* at 1132.

[94] *See id.* at 1166.

While specific performance is commonly considered to be an extraordinary remedy available only when damages at law are inadequate, current research shows that is it far more frequently available. *See, e.g.*, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

[95] *See In re Baby M.*, 525 A.2d at 1171. The New Jersey Supreme Court reversed this holding because New Jersey law allows for termination of parental rights only when it is voluntary or where there has been a finding of parental unfitness or abandonment. *See In re Baby M.*, 537 A.2d. at 1227, 1242. The court stated that the parents' rights were significant in any parental rights termination. *See id.* at 1252.

gave the judge the discretion to treat Ms. Whitehead as a nonparent, so long as that was consistent with the child's best interests.

Unlike use of the best interest standard in the typical case between two divorcing parents, where it is used to determine custody as in *In re Baby M.*, the best interest standard has been applied at the stage of defining the parents. Mr. Whitehead's parental rights, which are rarely addressed in discussion of the case, were terminated pursuant to the agreement as well. Although New Jersey has a rebuttable presumption that the husband is the biological father, the surrogacy agreement required Mr. Whitehead to take all appropriate actions to relinquish his rights. Apparently, it was also in the best interest of the child to rebut this presumption and to terminate Mr. Whitehead's parental rights without much examination.

Similarly, the appellate court in *In re Baby M.* never reached the unfitness issue. On the other hand, it used the best interest of the child standard in another manner. Unlike the lower court which used the best interest of the child standard essentially to rubber stamp its decisions on parental rights, the appellate court applied the best interest of the child standard in the most conventional way possible—to a dispute between the two biological parents.

In *In re Baby M.*, the New Jersey Supreme Court declared that paid surrogacy arrangements were void, contrary to statute and the public policy that only the child's best interests, not the parents' prior agreement, could be considered in deciding custody.[96] Under New Jersey law, each biological parent has an equal right to custody, and thus the court was faced with a dispute between the biological father and mother to which the best interest standard is applicable. The child's best interests, the court held, would be served by a custody award to the biological father with the possibility of visitation to the biological mother.[97]

The *In re Baby M.* case is thus transformed appropriately from a contract dispute into a custody proceeding. Rather than an analysis of rights of all of the potential parents (the Whiteheads and the Sterns) pursuant to the surrogacy contract, *In re Baby M.* becomes an examination of what custodial arrangement will best serve the child's interests. The focus is seemingly deflected from the parents to the child; and once again, the mother's unfitness becomes irrelevant.

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[96] *See id.* at 1246.

[97] *See id.* at 1261. On the other hand, the court noted the difference between a surrogacy arrangement and other custody disputes: "[T]his is not a divorce case where visitation is almost invariably granted to the non-custodial spouse. To some extent the facts here resemble cases where the non-custodial spouse has had practically no relationship with the child." *Id.* at 1263. The child's guardian had recommended at least a five-year delay in visitation, which "border[s] on termination," although might be warranted under the circumstances. *See id.* at 1263.

Both parents are then assumed to be potentially fit custodians and no issue is presented with respect to terminating parental rights.

Nonetheless, regardless of the validity of the surrogacy contract, both the trial and appellate courts in *In re Baby M.* found that the child's best interests dictated a custody award to the biological father. Each court was able to use the best interest standard to support its conclusions, although their determinations differed as to whether the standard required complete termination of the mother's rights or the opportunity for visitation.[98]

2. *Choosing Two Parents from All of the Possibilities: The New Reproductive Technologies*

In the traditional surrogacy situation, there are only two biological parents and courts turn to the best interest standard to decide on the appropriate custody award. In other surrogacy cases, courts have defined away the issue of the child's best interest by finding only one possible set of two matching parents.[99] This renders application of the best interest of the child standard irrelevant because the two designated parents share the same custody interests.

In these situations, however, there exists the possibility of multiple parents[100]: a gestational mother, a genetic mother, an adoptive mother, a sperm donor father,[101] a father married to a gestational or genetic mother,[102] and an

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[98] Martha Field has suggested that the child's best interests in a custody dispute will yield to a custody award in favor of the more highly educated, wealthier parent; she advocates a custody award to the mother. *See* Martha A. Field, *Surrogacy Contracts Gestational and Traditional: The Argument for Nonenforcement*, 31 WASHBURN L.J. 1 & 5 (1991).

[99] *See e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 478–80 (N.Y. App. Div. 1994) (declaring that husband and wife were the parents where, in action for divorce, father challenged parental rights of wife who was gestational, but not genetic, mother of twins); Arredondo v. Nodelman, 622 N.Y.S.2d 181, 182 (N.Y. Super. Ct. 1994) (holding that genetic, nongestational mother was entitled to finding of maternity); Belsito v. Clark, 644 N.E.2d 760, 767 (C.P. Summit County Prob. Div. 1994) (finding that genetic father and genetic mother are natural and legal parents).

[100] *See* Hill, *supra* note 1, at 355 (setting out slightly different list of potential parents).

[101] Under the Uniform Parentage Act, a sperm donor is not the biological father if the insemination is performed under the supervision of a physician. *See* UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 301 (1987); *see also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 534–36 (Cal. Ct. App. 1986) (finding that where insemination was not performed by physician, sperm donor is declared to be the legal father).

[102] In some states, the father is presumed to be the mother's husband. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 110 (1989) (upholding a California statute with such a presumption).

In a lesbian relationship, there may be a partner who is the intended (second) mother to the child. She cannot, however, take advantage of the presumption unless she is married to

adoptive father.[103] By deciding on only one mother and only one father, the "intended parents," there is no question of an unfitness standard or even the need for a determination of what would be in the child's best interests: those individuals will be deemed the proper custodians.

In these nontraditional surrogacy cases, there are several potential bases for parenthood, including contract, intent, marriage, or biology. But, what actually happens is that courts rule on parenthood and the custody decision flows inexorably from that determination. Indeed, once the two appropriate parents have been defined, any concern with the best interest of the child with respect to the child becomes moot. Of course, in a harmonious relationship where the genetic and gestational parent are different, but they both agree on who should be deemed the mother, it is sensible simply to designate the two parents.[104]

The situation becomes more complicated where the agreement between the gestational and the genetic mother dissolves. In *Johnson v. Calvert*, the California Supreme Court held that the woman who contributed the egg, and not the woman who gestated the fertilized egg and gave birth to the child, would be considered the legal mother.[105] Crispina and Mark Calvert had signed an agreement with Anna Johnson, pursuant to which Ms. Johnson agreed to gestate an embryo created from the Calverts' genetic material. Subsequently, Ms. Johnson became pregnant with such an embryo. During her pregnancy, the agreement broke down and the Calverts and Ms. Johnson filed lawsuits seeking to be declared the legal parents.

Both Ms. Johnson and Crispina Calvert could have been defined as the mother pursuant to California's Uniform Parentage Act, which provides that a mother-child relationship "may be established by proof of her having given

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the genetic or gestational mother. For further discussion of the legal recognition of gay and lesbian parenting relationships, see Polikoff, *supra* note 13.

[103] The sperm donor is typically the "adoptive" father, just as the genetic mother is typically the "adoptive" mother. In a recent twist on the potential for multiple parents, an alternative reproduction center is accused of implanting the eggs of one woman fertilized by her husband's sperm into the uterus of a second woman, married to another man, thereby resulting in four potential "parents." *See* Jill Smolowe, *The Test-Tube Custody Fight: Victims of the Irvine Stolen-Egg Scandal Go After Twins*, TIME, Mar. 18, 1996, at 80; *see also* HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE, ch.4 (forthcoming 1997).

[104] *See* Belsito v. Clark, 644 N.E.2d 760, 762 (C.P. Summit County Prob. Div. 1994). The gestational mother, who was the sister of the genetic mother, agreed to act as a surrogate and intended to relinquish the baby when he was born. *See id.* All of the parties sought, and received, a declaratory judgment that the baby was a legitimate child of the marriage between the genetic mother and her husband. *See id.*

[105] *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

birth to the child."[106] The different California courts that heard the case acknowledged that both women had legitimate claims to being the mother, but emphasized that California law "recognizes only one natural mother,"[107] so only one woman could hold that title. Even though California law declared that the woman who gave birth could be recognized as the biological mother, the court created another biological basis for motherhood: it decided that, as in paternity, maternity could be shown by establishing a genetic connection to the child. Thus, even though Ms. Johnson had given birth to the child, Ms. Calvert was genetically related to the baby. To break the tie between the two women, the court looked to intent as the touchstone of parenthood.[108] Accordingly, "she who intended to bring about the birth of a child that she intended to raise as her own" is the biological mother.[109] Thus, the combination of Ms. Calvert's genetic connection to the child with her intent to have a child, resulted in her being deemed the "natural" mother under California law. This seems analogous to what the trial court did in *In re Baby M.*, when it used intent not just to create parental status, but also to deprive a "nonintending" party of that status.

To award any parental rights to Ms. Johnson, the court believed a gestational surrogate mother would serve only to dilute Ms. Calvert's rights as *the* mother.[110] The court explicitly rejected the possibility of defining both women as the mother.

> We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. . . . To recognize parental rights in a third party with whom the Calvert

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[106] *See* CAL. CIV. CODE § 7003(1) (West 1983).

[107] *See Johnson*, 851 P.2d at 781.

[108] *See id.* at 782; *see also* Dolgin, *supra* note 1, at 1294–95 (criticizing intent); Shultz, *supra* note 1, at 322–23 (supporting an intent-based standard). Professor Randy Frances Kandel asks, somewhat rhetorically, "[W]hy . . . did the courts . . . decline to address contract and custody claims from the perspective that all the parties were parents of the child and that all might potentially participate in childraising?" Randy F. Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 178–79 (1994).

[109] *See Johnson*, 851 P.2d at 782. An interesting question is when intent becomes relevant. At the time of contracting, the genetic mother has the intent; at some point, the gestational mother develops the same intent of giving birth and raising the child as her own. *See infra* Part IV.C for further discussion and criticism of the intent standard.

[110] *See Johnson*, 851 P.2d at 781 n.8.

> family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.[111]

The court seemingly considered the possibility of finding two mothers, recognizing that in reality children may have multiple parents.[112] Nonetheless, the court was unwilling to take this step, perhaps because this would have required multiple parents at birth, rather than divorce. The court further justified its decision as threatening to the woman acting as mother. Of course, what this formulation conceals is not only how recognizing two mothers is such a threatening concept within the law, but also perhaps the interrelated issue of the difficulty of applying the best interest of the child standard in that situation.[113] Courts find application of the best interest standard difficult enough in the conventional one father/one mother situation.

As a secondary matter, the court did point out that its rule "should best promote certainty and stability for the child."[114] But, it then noted:

> [T]he best interest standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interest of the child is not with her.[115]

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[111] *See id.*

[112] Given both the number of divorced custodial parents who enter into new relationships as well as the number of single mothers who may enter into subsequent relationships, it is common for children to have stepparents who have not legally adopted them and who generally stand as a legal stranger to the child. *See* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38 (1984).

[113] It is thus interesting to contrast the *C.C.R.S.* situation, *see* discussion *supra* notes 71–86 and accompanying text, where the court recognized psychological parents who ultimately received custody. California does not allow "de facto" or "psychological" parents to receive custody unless it would be detrimental to allow the child to remain with her natural parents. *See* Nancy S. v. Michele G., 228 Cal. App. 3d 831 (1991); *see also* Polikoff, *supra* note 13.

The gay and lesbian parenting situations have also presented issues concerning psychological parents.

[114] *See Johnson*, 851 P.2d at 783.

[115] *Id.* at 782 n.10. The court's statement could actually be read as an indictment of any use of the best interest of the child standard. It only applies at a time of instability and, in more traditional situations, it clearly signifies a dispute between the natural father and mother, each of whom has residual custodial rights.

Thus, even though the child's interests played *some* (albeit limited) role in the court's determination, the court's focus in *Johnson v. Calvert* was primarily on the adults involved and on their rights with respect to the child, notwithstanding the court's conscientious note of the beneficial impact of its decision on the child. In establishing the limited number of adults who were entitled to parental status, the court predetermined, in effect, the child's best interest according to traditional assumptions that two parents, especially when they are married to each other, are best for the child.[116]

By contrast, the dissent in *Johnson v. Calvert* would have relied on the best interest of the child standard to determine parentage.[117] Justice Kennard argued that the appropriate method for determining parenthood, for breaking the tie between the two women who sought to be declared the "legal mother," was to "apply the standard most protective of child welfare—the best interests of the child."[118] Instead of using a standard that she alleged was based in contract, intellectual property, and tort law, Justice Kennard looked to family law.[119] Although Justice Kennard would have remanded the case (and consequently did not indicate how she would have ruled), she did set out a series of factors to guide a trial court's decision; application of these factors in all likelihood would have resulted in the child staying with the genetic mother and the biological father.[120]

Justice Kennard's use of the best interest standard is particularly interesting because of *when* she would use it: she would have applied the standard to the parentage decision itself, not to the resulting custody decision.[121] Her focus, then, is always on the child, not on the interests of the adults involved.

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116 This is what happens in the unwed father cases. *See infra* Part III.C.

117 *See* 851 P.2d at 788 (Kennard, J., dissenting). Justice Kennard is the only female justice on the California Supreme Court.

118 *Id.* at 789.

119 *See id.* at 799.

120 Justice Kennard's factors included: "the ability to nurture the child physically and psychologically . . . to provide ethical and intellectual guidance. . . . the 'well recognized right' of every child 'to stability and continuity.' The intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests. . . ." *Id.* at 800 (citations omitted).

Justice Kennard does dispute the majority's contention that the gestational mother's contracting away of her rights acts as an implicit acknowledgement that a custody award to her would not be in the child's best interests. *See id.* at 799–800 n.4.

121 *See id.* at 799 n.4.

Professor Janet Dolgin interprets the dissent's use of the best interest standard as a suggestion "that parents can be linked to their children without reliance on inexorable truths about the everlasting essence of the parent-child connection and that the identification of parentage is a *social choice*." Dolgin, *supra* note 1, at 1286.

In the majority opinion of *Johnson v. Calvert*, the question of "who is the parent?" represents the determinative issue. The custody award becomes totally dependent on the definition of parentage. In this situation of multiple women claiming the same child, whoever is named "mother" becomes the child's custodian and the other woman loses all rights whatsoever with respect to the child. She becomes a nonparent, a third party. But the same is true under the dissent's approach. Using the best interest of the child at the parentage stage of the proceeding, as suggested by Justice Kennard, in effect makes parentage determinative of custody. Unfitness remains irrelevant because no existing parental rights need to be terminated. Instead of applying the best interest of the child standard to a dispute between a parent and a nonparent, as has occurred in the adoption contexts discussed above, the standard becomes determinative of who is a parent. This analysis thus moots any issue as to whether the woman who is the nonparent can nonetheless claim that a custody award to her is in the child's best interests. The dissent is problematic because it uses the best interest standard, which completely leaves out the nonmother to decide on parental status. Use of the best interest standard to determine custody—in the stage *after* defining parenthood—would not, however, necessarily overlook the interests of either woman.

C. *Unwed Fathers' Cases*

In a series of cases beginning in 1972, the United States Supreme Court has considered the rights of unwed fathers to custody of their children. The conflicting opinions can be reconciled to mean two things. First, fathers have the opportunity, not the biological mandate, to establish relationships with their children.[122] Second, preservation of the traditional family unit takes priority over the rights of even the unwed biological father who does establish a relationship with his child.[123] These cases can also be reconciled as allowing the presumption concerning the best interest of the child to trump the rights of biological parents in what the Court deems to be appropriate cases and consequently, accepting a definition of parent that excludes the biological parent

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[122] *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983); Caban v. Mohammed, 441 U.S. 380, 392–93 (1979); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972); *see also* Smith v. Organization of Foster Families, 431 U.S. 816, 843–44 (1977) (recognizing a parent's liberty interest deriving from blood, state law, and basic human rights).

[123] *See* Michael H. v. Gerald D., 491 U.S. 110, 124 (1989); Dolgin, *supra* note 4, at 663–72; Forman, *supra* note 20, at 977–78; *see also* Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995) (discussing the many different ways in which the law favors the nuclear family).

from asserting rights. Just as in the surrogacy cases, courts limit parental status to one mother and one father in the unwed father cases.

While the Court has acknowledged that intact biological families cannot be broken up without some finding of the unfitness of the parents,[124] it stated, in *Quilloin v. Walcott*, that unwed fathers who are not in intact families can be denied parental rights based on an application of the best interest standard.[125] Where, as in *Quilloin*, an adoption by the biological mother and her husband would help to preserve an existing family unit, and the biological father had never lived with the child or the mother, the Court held that the state may deem his rights inferior to the child's best interests.[126] Although the unwed father in that case was acknowledged to be the biological parent and had consistently visited the child,[127] he had not legitimated the child pursuant to Georgia law, and thus could exercise no parental powers.[128] In *Quilloin*, the best interest of the child standard serves to prevent the biological father from acquiring any constitutionally recognized parental rights; consequently, it serves to define who qualifies as the father without considering biology. As in Justice Kennard's later dissent in *Johnson v. Calvert*, the best interest standard decides the identity of the parent without fully recognizing the claims of the putative parent.

Indeed, the Court has consistently allowed the states to define "father" in accordance with general societal assumptions with respect to the appropriateness of two heterosexual parents married to each other. In *Michael H. v. Gerald D.*, the Court upheld the constitutionality of a California statute

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[124] In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Court held that in a termination of parental rights proceeding, a state must prove by clear and convincing evidence its allegations against the parents. The previous term, however, the Court had held that there was no constitutional right to the appointment of counsel at termination hearings. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24–32 (1981). For a strong defense of the importance of keeping potentially abused or neglected children with their parents, see Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976); *see also* Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

[125] *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978). *Santosky* involved state action to remove a child from the family, while *Quilloin* involved a dispute between nonstate actors, perhaps thereby accounting for the different standards. Nonetheless, *Quilloin* shows the impact of state choices and values on the family unit.

[126] *Id.* at 255. Of course, he may have rights if, for example, he sends a postcard to the putative father registry.

[127] Indeed, Darrell wanted both to continue visitation with his natural father and to be adopted by his mother's husband. *See id.* at 251.

[128] *See id.* at 249.

which presumed that a child born to a married woman, who was "cohabitating" with her husband, was a child of the marriage.[129] In that case, a man not married to the mother had a 98.07% probability of being the biological father; he sought to be declared the father under California law.[130] Even though he had some established relationship to both the mother and the child, the courts held that he had no constitutionally recognized legal rights as a father.[131] What the California statute at issue does, in addition to upholding the marital unit, is to define parent so as to exclude the unwed, albeit biological, father.[132]

Unlike *Quilloin*, where the best interest of the child justified a redefinition of parent, in *Michael H.*, the child's best interests were not relevant because parent was redefined. That is, because the Court was willing to recognize only one person who could exercise paternal rights,[133] there was no custody dispute. Thus, in *Michael H.*, the definition of parent implicitly decided the custody issue, while in *Quilloin*, the custody issue explicitly decided the identity of the parent. And, like the other unwed father cases, the decision in *Michael H.*, that the biological mother's husband was the father returns to traditional conceptions of married parents' rights. It also shows, however, the malleability of parental rights. If the mother was not married, then Gerald would have been named the father. Because of the relationship of parental rights and marriage, however, he was not the legal father. The definition of father returns to an unstable, changing label that is independent of biology,[134] although somewhat dependent

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[129] Michael H. v. Gerald D., 491 U.S. 110, 136 (1989). Many other states have similar statutory presumptions.

[130] *See id.* at 114.

[131] *See id.* at 131–32.

[132] *See* CAL. EVID. CODE § 621 (West Supp. 1989).

[133] *See Michael H.*, 491 U.S. at 130–31. The Court stated, "[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country." *Id.* at 131. A lower court noted, "'In enacting a conclusive presumption, the Legislature must have intended that only one man can be adjudicated a child's father.'" Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1013 (1987) (quoting Vincent B. v. Joan R., 126 Cal. App. 3d 619, 627 (1981), *appeal dismissed*, 459 U.S. 807 (1982)).

Other courts have held that the determination of an unwed father's paternity is subject to a best interest analysis: if it is not in the child's best interest to declare that a biological father is the father, then he has no rights. For example, the Montana Supreme Court held that the best interest standard was appropriate for deciding on paternity. *See In re* Paternity of Adam, 903 P.2d 207 (Mont. 1995), *cert. denied*, 116 S. Ct. 1544 (1996). In that case, the biological father filed a "Notice of Intent to Claim Paternity" prior to the child's birth. His petition was dismissed because it was not in the child's best interests to find that he was the father, especially in light of the mother and her husband's relationship with each other and the child. *See id.* at 211.

[134] Traditionally, prior to *Stanley*, marriage (or the lack thereof) trumped biology.

on how the state defines the child's best interests. These cases involve a complicated interaction of determining the child's best interests and assumptions about the intact family (or married parents). Because of the strong societal preference for married parents, the child's best interests are presumed to be served by according parental status to the member of an intact family.

IV. THE EFFECTS OF REDEFINING PARENT

When courts struggle with assigning parenthood, the issue of who succeeds—whether it be as the child's custodian or as the child's parent, entitled to exercise all of the exclusive rights associated with that status—is complex. The indeterminacy of the concepts of both "parent" and of the child's best interests gives judges discretion to choose any factors they deem relevant to the custody award. When the biological mother is married and the biological father—or the other potential biological mother—is not, the biological mother wins.[135] When it comes to the new reproductive technologies, and there are arguably two "natural" mothers, the mother who belongs with the biological father wins. Similarly, in the surrogacy context, the biological father wins. Thus, the biological mother who is not married to the biological father always loses against a traditional-appearing nuclear family; she wins, of course, when she is married to the biological father and is part of a nuclear family herself. The potential adoptive parents win, so long as there is no inquiry into the unfitness of the biological parents. This scheme may serve to reinforce married fathers' rights. Moreover, although the rhetoric places the children's interests as central, parental status and rights are extremely significant.

Indeed, where the line is drawn—between who is a parent and who is not—predetermines whose rights control. In effect, what happens is that the adults' rights determine what happens to the child. When a court holds that a biological parent must be declared unfit before a third party may have custody, then the biological parent almost invariably wins.[136] As the adoption, surrogacy, and unwed father cases show, there are two different mechanisms for circumventing

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[135] *See* Dolgin, *supra* note 4, at 650–72 (discussing the Court's unwed father cases and showing that courts support traditional family forms by awarding custody to the natural mother when she is married). *Stanley* and *Quilloin*, both concerned the rights of unwed fathers, without an in-depth examination of the corresponding rights of wedded fathers or unwed mothers.

[136] We can contrast what happened in the case of *Baby Jessica*, 502 N.W.2d 649 (Mich. 1993), to what happened in the discussion in *In re* C.C.R.S., 892 P.2d 246 (Colo. 1995). In the former case, the biological father was found neither to have relinquished his parental rights nor to be unfit, and he received custody. In the latter case, as discussed above, even though neither biological parent was found unfit, the potential adoptive parents won through a best interest of the child determination.

the fitness determination and thereby recognizing adults' rights: courts use either a best interest of the child standard or they simply redefine the notion of parent. In these cases, the consistent loser is the unmarried biological mother and the consistent winner is the married, biological or adoptive father.

Determining parentage should, however, be difficult in light of the new reproductive technologies as well as the changing shape of the American family. As Martha Minow asserts, she is "worr[ied] about . . . . [a] court [that] assumed that it knew what a 'parent' is."[137] Indeed, courts actually interpret and reinterpret the meaning of parent, and the attendant rights, to include different categories of adults. Consequently, the term parent is capable of covering a multitude of people depending on the facts of the situation. Nonetheless, most courts do seek to find only one mother and one father for each child in accordance with dominant cultural narratives, although this too is no longer inevitable, at least in a few adoption cases.

Instead of the continued indeterminacy of definitions of parenthood, which perpetuate the differential treatment of mothers and fathers, and of married and unmarried parents, several potential solutions have been proposed and are explored below. Each sets out a different test for determining who can exercise parental rights. The first proposal involves using biology as the basis for parenthood. A second proposal would accord primary parent status solely to the mother, elevating the "mother-child dyad" over other family forms.[138] A third proposal uses intent as the basis for recognizing parenthood. A fourth proposal involves recognizing more than two adults as the parents, rather than attempting to assign the label only to one, and using various mechanisms for designating those adults as parents. Finally, a fifth proposal, suggesting that parenthood be determined based on a combination of biology or adoption and nurturance, combines elements of several other approaches. Each of these solutions has problems in conception and application, however. What each solution does show is the significance of redefining parents for child custody determinations and the implications of such redefinitions for the child's interests.

A. *Biology*

One deceptively simple rule would reinforce the rights of the genetic parents, requiring that custody be awarded based solely on biology.[139] Genetics

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[137] Minow, *supra* note 85, at 272.

[138] For a general discussion of the "mother-child dyad," *see infra* notes 151–159 and accompanying text.

[139] Of course, as is clear from the surrogacy cases, and as the critique of the "biology is everything" position discussed *infra* shows, genetics and biology are not necessarily the same.

would determine the identity of the parents. This solution is effective in the conventional custody situation, when a married couple seeks a divorce and the husband and wife are typically the biological parents.[140] It is also effective for determining paternity, because there can be only one biological sperm donor, and under this approach, he would be the father regardless of the mother's marital state.[141] It is, however, problematic when it comes to determining maternity; moreover, it ignores other values that our culture finds significant.

As discussed earlier, most state laws use a mixture of biological and emotional connections to determine paternity. While there is no distinction between the rights of married and unmarried mothers, there are significant distinctions between the rights of married and unwed "fathers."[142] Marriage makes the difference as to whether the men will be defined as the parent. Using biology alone to establish a bright-line rule would require dissolving the distinctions between married and unwed fathers, and simply recognizing paternal rights that vested in the man who contributed the sperm.[143] Thus,

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But, for purposes of exploring the parameters of this approach to parenthood, I am initially conflating the two.

[140] Paternity is normally not a contested issue in these cases. When it is, there may be a statutory presumption that the husband is the biological father, or the court may reinforce his parental rights in other ways. *See, e.g., In re* Gallagher, 539 N.W.2d 479, 482 (Iowa 1995), *amended, reh'g denied, remanded*, 1995 Iowa Sup. LEXIS 224 (Iowa Nov. 17, 1995). Until recently, maternity was never contested.

[141] *See* Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 736–37 (advocating such a position); Forman, *supra* note 20, at 988–1000 (exploring promises and dilemmas of such an approach); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992) (advocating such a position).

[142] In most states, married men are presumed to be the father of marital children, even if the spouses were not living together during the pregnancy, while unwed men must take affirmative steps to claim their paternity. For example, see the facts of *Michael H. v. Gerald D.*, 491 U.S. 110, 113–15 (1989). Indeed, the stereotype of unwed fathers is that they are uninvolved with their children. *See* Dowd, *supra* note 123, at 53 ("[T]he negative connotation of 'single parent' is apparent in paternity determinations, where the legal process presumes the stereotype of the unwilling, irresponsible unwed father."). Even though married fathers may similarly be uninvolved with their children, *see* ARLIE HOCHSCHILD, THE SECOND SHIFT (1989); Milton Regan, *Spouses and Strangers Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2369 n.331 (1994); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2240–41 (1994), their actual emotional relationship is irrelevant to their legal rights.

[143] In light of the accuracy of human leukocyte antigen ("HLA") testing, it would be comparatively easy to establish just who the father was. Where there has been an artificial insemination by a donor ("AID"), the donor would similarly be recognized as the father

under an approach based on biology, marriage would be irrelevant for both mothers and fathers. This would have a different impact on husbands (who could now deny, or be deprived of, paternal status) than on wives.

When it comes to adoption, implementing a scheme where parental rights are based on biology would accord strong recognition to the rights of the biological mother and father. Assuming that the identity of the biological mother is clear, a new adoption scheme based solely on biology could simply recognize that she could not definitively relinquish her parental rights until one year (or more) after the child's birth. Providing such a long period of time for relinquishment accords strong recognition of her parental rights and would also be comparatively easy to administer due to both its simplicity and its clarity. Similarly, an adoption would be impermissible unless the consent of the biological father, as identified through blood tests, could be procured. He too presumably would be granted a long period of time before his relinquishment would be final.[144]

An approach based solely on biology is, of course, easy to administer. And, it serves to protect the rights of all biological parents, regardless of their income. It becomes more difficult to allow class to affect the custody analysis where biology is the sole determinant of parentage.

Biology becomes a more difficult solution to the surrogacy cases where the determination of the "mother" may be in question. While at common law she who gave birth was considered to be the mother, she who gave birth was also both the gestational and the genetic mother.[145] When a gestational and a genetic

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under a strict biology standard; or, as in many states, if the insemination is performed by a doctor, the man married to the mother could be presumed to be the father.

[144] The approach set out in text accords very strong rights based on biology. There are variations, such as shorter periods before consent could be final, but they do not change the basic scheme.

Moreover, this approach assumes that once the biological parents are identified, they are entitled to all of the rights and responsibilities that are accorded to parental status. As Jana Singer suggests, an alternative approach might recognize parents based on biology, but then define the bundle of rights associated with parenthood differently. Interview with Jana Singer, Professor, University of Maryland (Mar. 18, 1996) (on file with author). That is, the identification of the biological "parents" could be separate from the issue of who will parent any particular child. Resolving a custody dispute between biological parents and a third party would then depend on what powers the law assigns to the status of biological parenthood.

[145] *See, e.g.*, Belsito v. Clark, 644 N.E.2d 760, 767 (C.P. Summit County Prob. Div. 1994). Professor Kaas advocates a strong parental preference and defines parent as someone "who is the biological parent of a child or who has adopted a child, if the adoption is final," Kaas, *supra* note 6, at 1129. Professor Kaas would not apply the parental preference to various proceedings, including those arising after a surrogacy or sperm donor arrangement has failed. *See id.* at 1129–32

surrogate each seek to be declared the mother, however, biology provides no simple answer. Even though one court found referred to the gestational mother as merely an incubator,[146] this is contrary to other medical evidence as to the impact of gestational actions on the fetus.[147] Consequently, one of the other methods explored in this paper must decide the issue.

In addition, there are more theoretical problems with this approach. As a society, we may want to choose—and in fact, we already have chosen—other values, such as nurturance, over biology.[148] For example, allowing biological fathers rights to custody of an infant that are equal to those of the biological mother may be a problematic social choice, especially where the father has had little or no contact with that woman or the child. Or, some defend the parental rights of married men, who may not be biological fathers, but who have functioned as social fathers.[149] Or, the intent of the parents may be an important factor to consider in deciding who should be declared the parents.[150] Biology can be a rigid basis for deciding parental status.

B. *Mother-Child Dyad*

Several feminist scholars have suggested that the core familial unit to be recognized is the relationship between mother and child. Martha Fineman argues that a mother-child dyad should be the primary familial affiliation.[151]

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[146] *See, e.g.*, Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting).

[147] *See* Sherrie Lynne Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 545–47 (1992). Ms. Russell-Brown also notes that recognition of only the genetic mother's rights fosters exploitation of the gestational surrogate, who is likely to be poor and African-American or Hispanic.

[148] Professors Dreyfuss and Nelkin note that "genetic reasoning" may "preempt[] discussion of other values at stake." Rochelle C. Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 338 (1992).

And, the meaning of biology is inherently political. Historically, the significance of biology has depended on race and gender. *See* Roberts, *supra* note 18, at 213; *see also* Dreyfuss & Nelkin, *supra*, at 339–41 (discussing the myth of scientific neutrality). Using a standard based solely on biology would require some distance from this traditional use of biology; attempts to define "biology" may inevitably suffer from questionable bias.

[149] *See, e.g.*, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 131–37 (1993); Michael H. v. Gerald D., 491 U.S. 110 (1989).

[150] *See infra* notes 160–69 for further discussion of situations, such as donor insemination, where intent is useful.

[151] *See* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 233 (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER]; Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of*

She explains that other adults may be included: "[F]athers, or nonprimary caretakers who have sexual affiliation to the primary caretaker, are certainly free under my model to develop and maintain significant connections with their sexual partner and her children *if she agrees to such affiliation.*"[152] Under this model, the (biological) mother thus has control over the child's development of familial relationships with anyone else. The mother-child dyad gains additional support from the work of Goldstein, Freud, and Solnit, who advocate that custody and other forms of control be awarded to the one person who is the sole psychological parent.[153]

This perspective definitively resolves disputes by recognizing the decisionmaking authority of only one parent. There will be no more parental conflicts because only the mother will have legally cognizable rights. Thus, unwed fathers would be unable to veto the biological mother's consent to adoption, and mothers would not be required to notify the sperm donors of their pregnancy.[154] Presumably, in the surrogacy context, only the mother would have any parental rights, although deciding between the gestational or genetic mother would be difficult.

One problem with this perspective is that it perpetuates stereotypes about women and the use of rigid gender boundaries.[155] Although women do, in fact, provide a disproportionate share of caretaking, this statement is not true of all women.[156] The mother-child dyad perpetuates an ideology in which only women are encouraged to be caretakers.[157]

Privacy, 23 CONN. L. REV. 955, 970–71 (1991) [hereinafter Fineman, *Intimacy*]; *see also* Becker, *supra* note 41, at 203–21 (advocating a maternal deference standard).

[152] Fineman, *Intimacy*, *supra* note 151, at 971 (emphasis added).

[153] *See* GOLDSTEIN ET AL., *supra* note 71. The "psychological parent" is the individual "who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." *Id.* at 98. As formulated by Goldstein, Freud, and Solnit, the psychological parent need not be biologically related to the child. *See id.*

[154] *See* Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 933–36 (1994) (book review). Professor Dowd notes that where a man is committed to the family unit, the law should recognize his bond with the child. *See id.* at 934.

[155] Martha Fineman does acknowledge that men may be primary caretakers, although she phrases her standard as the mother-child dyad. *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 151, at 234. *But see* M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2189–90 (1995) (book review) (suggesting some ambivalence in Professor Fineman's inclusion of men as capable of being the "mother").

[156] I am speaking of the problem of essentializing women. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1988); Katherine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 21 (1986).

[157] *See* Bartlett & Stack, *supra* note 156, at 32.

A second problem with this perspective (although perhaps a benefit to its proponents) is the lack of rights for fathers and then, even if the primary caretaker is gender-neutral, for others with whom children have developed strong emotional attachments. While Professor Fineman believes that gender neutrality in family law has only disadvantaged women, there are many persuasive arguments in favor of according rights to fathers and other parental figures. First of all, regardless of the merits of single-parent families, it is hard for one individual to raise a child. In many single-parent families, there is an extensive support system that helps the single-parent cope.[158] Thus, the mother is not, practically speaking, the sole decisionmaker. Second, to the extent that any individuals have formed significant relationships with the children, these relationships will have no legal significance.[159] Thus, neither married nor unmarried fathers, nor lesbian comothers could exercise any rights.

C. *Intent*

Another method for designating those entitled to all of the rights associated with parental status is to use "intent."[160] This approach "places a mental element, intention, over the tangible, biological tie."[161] Accordingly, where the proposed parents deliberately and explicitly expend efforts to create a child, then their intentions should be respected.[162] This approach has most frequently been applied to the surrogacy context, where the commissioning parents—those who, by preconception, take actions to bring about the child's existence—are

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Another critique of Professor Fineman's proposal notes that she is substituting a matriarchal family for a patriarchal family, but that the same problems remain. *See* Slaughter, *supra* note 155, at 2188–89.

[158] *See generally* Czapanskiy, *Grandparents*, *supra* note 5 (discussing grandparents' roles in child care, particularly in single-parent homes). A related problem is that this model would require massive government support to take the place of the paternal support obligation, unless the proponents of this approach intend to preserve mandatory paternal support responsibilities in the context of paternal rights at the option of the mother.

[159] If the mother has consented to these relationships, then of course rights of third parties will be respected. This, however, opens up another area of potential controversy as third parties assert that the mother has in fact consented.

[160] For discussions of the different meanings of intent, see Dolgin, *supra* note 1; Hill, *supra* note 1; Shultz, *supra* note 1.

[161] *See* Hill, *supra* note 1, at 414.

[162] *See* Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking* AID *in the Law*, 44 DUKE L.J. 524, 538–42 (1994) (discussing the role of intent when a woman is artificially inseminated by a donor, and both agree, preconception, on the donor's rights); Shultz, *supra* note 1, at 302–03.

deemed the intended parents.[163] By signing a contract in which they agree to pay someone else for her "services" in helping to create a child, they deserve to be named the parents. But the approach may also be useful in the adoption context, where the people who want the child, care for the child, and have taken the child after she is relinquished, could be deemed the intending parents.[164] This approach appears to assume that the birth mother did not intend to get pregnant or keep the baby, while the adoptive parents have undergone an intrusive home study and otherwise indicated their extremely strong intent to raise a child. Similarly, the unwed father who is unaware of the pregnancy or the child,[165] or who is uninvolved with the child, could be termed an unintentional parent who has not chosen the rights and responsibilities of parenthood. The law could elevate conscious and deliberate choice as the sole criterion of parenthood; in Professor Shultz's words, this would mean that "intentions that are . . . bargained-for ought presumptively to determine legal parenthood."[166]

One problem with this approach, however, is that intent changes. The gestational mother may not have initially intended to keep her child but, as the pregnancy progresses, she may change her mind.[167] Or, the "intending parents" may have only wanted a genetically normal, healthy child, while the child born to the surrogate is not. An unwed father may not have intended to create a child, but may change his mind as the pregnancy progresses or after he meets the child. At what point in time do we respect intent?

A second problem concerns the meaning of intent and choice. All choice is socially constructed, and there is a debate over when to respect choice and when to act paternalistically.[168] Should we respect the surrogate mother's initial

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[163] *See* Hill, *supra* note 1, at 414–19.

[164] Professor Shultz suggests that using intent in the adoption context might allow adoptive and biological parents more choices on how to structure the adoption itself (although she does not address the issue of how to decide between the two sets of parents if the adoption becomes contested). *See* Shultz, *supra* note 1, at 321.

[165] In both the *Baby Jessica* and *Baby Richard* cases, the father was, at least arguably, unaware of the child until after his or her birth, although Otto Kirchner was aware that Baby Richard's mother was pregnant. *See Baby Richard*, 649 N.E.2d 324, 327 (Ill. 1995); *Baby Jessica*, 502 N.W.2d 649 (Mich. 1993).

[166] Shultz, *supra* note 1, at 323.

[167] As Vicki Jackson points out, intent regarding parental status frequently changes; we do not force women who, prebirth, intend to put their children up for adoption, to actually do so after birth. *See* Vicki C. Jackson, Baby M *and the Question of Parenthood*, 76 GEO. L.J. 1811, 1814 (1988).

[168] *See, e.g.*, CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Kathryn Abrams, *Feminist Lawyering and Legal*

choice? Or, should we, as some critics suggest, instead look at the culture which forced her into such a choice, and respect her later decision to keep the child? Third, the intent model assumes legal acceptance of surrogacy, an assertion that is becoming increasingly counter-factual.[169] Finally, it seems harsh toward the biological parents to cut off their rights without allowing them second thoughts. While biology is not an appropriate test by itself, the intent approach makes it irrelevant.

D. *Responsibility*

A fourth solution would recognize parenthood based on a combination of biology and responsibility. In this view, only people who had indicated that they would act responsibly and altruistically toward their children would be able to exercise parental rights.[170] Parental rights would be based on a "mixture of genetic relationship, assumption of responsibility, and provision of care to the child (including gestation)."[171] Biology alone, then, would be insufficient without other indicia of caring and attachment.

In the unwed father and adoption cases, paternal rights would depend on the man's relationship with the mother and with the child (depending on her age). If he had established a sufficient relationship, then he would be able to veto an adoption and gain custody.[172] Similarly, in the surrogacy cases, the question would be who had established a relationship with the child. The mother would probably be the woman who had gestated the child, regardless of her genetic relationship, while the father would be the sperm donor. In the

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Method, 16 L. & SOC. INQUIRY 373 (1991) (book review); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

[169] *See* Mahoney, *supra* note 112.

[170] *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1465 (1991); Shanley, *supra* note 68, at 65; *see also* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (emphasizing the importance of relationships and responsibility over rights).

This approach is similar to the so-called functional approach to parenthood, which recognizes families based on whether they fulfill the normal functions of families. *See* Bartlett, *supra* note 13, at 944–51 (proposing nonexclusive parenthood to recognize de facto parenting relationships in addition to those of the legal and natural parents); Polikoff, *supra* note 13, at 489–90 (expanding the definition of parent to include functional parents); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1644–48 (1991) (contrasting functionalist and formalist approaches to defining family members).

[171] Shanley, *supra* note 68, at 65.

[172] *See* Czapanskiy, *supra* note 170, at 1477–80 (setting out different ways to measure responsibility of unwed fathers so that they could veto adoptions).

newborn context, this approach might lead to the same result as an approach based on intent.

While the relationship test seeks to reward behavior that is child-oriented, it may be difficult to administer. What efforts must a man make toward a pregnant woman in order to ensure his rights with respect to a newborn? Is gestation really sufficient to establish maternity? If a genetic mother accompanies the gestational mother to all doctor's appointments, etc., has she shown adequate commitment? What about the gestational-genetic surrogacy cases, where both women have a biological and emotional relationship with the child? As with the multiple-parent standard, discussed next, judges continue to have a great deal of discretion to define parents. On the other hand, like the multiple-parent test, there is arguably less discretion to exclude people with parental relationships who would not otherwise qualify because they lack the necessary biological or adoptive connection to the child.[173]

E. *Multiple Parents*

The final solution, and perhaps the most radical under existing law, would involve recognizing multiple adults entitled to the bundle of rights associated with parental status. While this solution builds on the intent, biology, and responsibility approaches, it differs because of its explicit recognition of the possibility of multiple parents, beginning at a child's birth.[174] Current legal doctrine generally assumes one mother and one father for every child.[175] But,

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[173] There are other possible rules as well. For example, some have suggested the development of an intermediate status of parents, with rights somewhere between those of third parties and those of parents. *See* Elizabeth J. Aulik, Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604 (1979); Kris Franklin, Note, *"A Family Like Any Other Family": Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1061 n.188 (1990–91) (suggesting a possible system with different levels of parenting); *see also* Mahoney, *supra* note 112, at 52–58 (advocating stepparent's assumption of duties traditionally assigned to legal parents).

[174] The intent and biology approaches either explicitly or implicitly contemplate two parents. The functional and responsibility approaches examine whether the adults have acted as parents as a basis for according them rights; many advocates of the "responsibility" approach implicitly assume two parents when they discuss "triadic" relationships between the parents and a child, even though they acknowledge the possibility of more than two parents.

[175] Professor Shultz insists that choosing between potential parents is necessary as a result of our social policies relating to parenthood so that children will not have more than one mother or father. *See* Shultz, *supra* note 1, at 330; *see also* Belsito v. Clark, 644 N.E.2d 760, 763 (C.P. Summit County Prob. Div. 1994) (stating that "society and the law recognize only one natural mother and father"); Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1012 (1987); Polikoff, *supra* note 13, at 468 (discussing a legal theory of parenthood).

given the complexities of adoption and surrogacy, and of alternative family forms, the reality is very different from legal doctrine. Some scholars have suggested that biological parents should be able to designate additional adults as parents.[176] Others have suggested that the law accord some form of parental status to an adult who has been the "legal, natural, or psychological parent of the child[,]" provided that there has been some type of continuing relationship established between the child and the third party.[177]

Under this approach, disputes between a gestational and a genetic mother could be resolved through the same means as other custody disputes between parents. Under the existing system, once one woman is defined as the mother, the other woman loses virtually any rights or relationship to the child because she is entitled to the same rights as any other third party. With a recognition of two mothers, either one could receive custody or visitation; or, in cases of unfitness, the rights of one could be terminated.

While this approach recognizes that a child might have multiple parents at birth under a surrogacy arrangement, the situation is somewhat different when it comes to adoption. Adoption disputes arise only after one parent has begun the process of relinquishing her rights, and either she changes her mind, or the biological father contests the adoption. Nonetheless, disputes between the potential adoptive parents and the biological parent(s) could also be resolved through the multiple-parent model, depending on when the biological parents

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Interestingly enough, the Court has not completely foreclosed a constitutionally protected liberty interest for adults other than the "natural parent." *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 855 (1977).

[176] *See* Polikoff, *supra* note 13, at 464 (proposing that parenthood be expanded to "include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature"). Professor Katharine Bartlett proposes that the relationship of the potential psychological parent must have begun "with the consent of the child's legal parent or under court order." Bartlett, *supra* note 13, at 947.

[177] *See* Bartlett, *supra* note 13, at 946. Professor Bartlett's proposal is limited, however, to situations outside of the traditional nuclear family where the child's relationship with her parents has been disrupted, and would probably not apply to newborns.

The Oregon state legislature enacted a statute that allows anyone who "has established emotional ties creating a child-parent relationship with a child" to seek custody or visitation. OR. REV. STAT. § 109.119 (Supp. 1994). The statute defines a qualifying child-parent relationship as one that has existed for six months prior to the filing of the action, and where the emotional parent has lived in the same household as the child, *or* where the person has maintained a continuous relationship for a year. *See id.* at § 109.119(4)-(5). By its terms, the statute cannot apply to newborns.

challenge the potential adoption.[178] If the potential adoptive parents are proceeding pursuant to a court order as to their rights, then they would probably qualify as "psychological" parents to whom custody might be awarded, while visitation could be awarded to the biological parents (or vice versa).[179]

Such a solution helps with the difficulties in determining parenthood. Recognizing multiple parents responds to the realities of many children's lives who may have multiple parents through surrogacy and adoption, as well as through gay and lesbian parenting relationships and remarriage.[180]

Nonetheless, there are two sets of problems with the multiple-parent approach. The first problem concerns when to recognize multiple parents and the discretion that this continues to grant judges. Most of the proposals for multiple parents require some emotional relationship between the child and the parent; where an infant is involved, then, the multiple-parent approach must rely on another method, such as intent or biology. For older children, where there actually may be multiple adults with legitimate claims, it may be difficult to balance the adults' rights while respecting those of the child.

The second problem with this approach is that recognizing multiple parents is likely to require further judicial involvement when the parents cannot agree on custody and other issues. The standard that would most probably be used to resolve these disputes among parents is the best interest standard, with all of its drawbacks, including the race and class biases inherent in application of the

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[178] The Uniform Adoption Act gives a parent just eight days in which to change his or her mind after the child's birth, regardless of when during that period, the consent was actually signed. *See* UNIF. ADOPTION ACT §§ 2-404, 2-408(a), 9 U.L.A. 30, 33 (Supp. 1996). The Uniform Adoption Act does not seem to allow for revocation if the consent has been signed after that eight-day period, unless the adoptive parents agree to the revocation. *See id.* §§ 2-404(a), 2-408(a). Eight days is clearly too short a time period, especially given that the parent might not even sign the relinquishment until seven days after the birth. While almost everyone involved in adoption issues believes that the biological parents need some period of time before they can finally relinquish their parental rights, the decision as to the appropriate amount of time is extremely difficult.

[179] The multiple-parent model also suggests that adoption records remain open so that, even if there is no visitation between the child and the biological parents, they are able to communicate when they so choose.

[180] For example, at least 15% of children in divorced families will have parents who remarry *and* redivorce. *See* Susan Chira, *Struggling to Find Stability When Divorce Is a Pattern*, N.Y. TIMES, Mar. 19, 1995, at A1; *see also* David L. Chambers, *Stepparents, Biological Parents, and the Law's Perceptions of "Family" After Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Bartlett, *supra* note 13, at 912–19 (pointing out the need to reconsider stepparents' rights); Mahoney, *supra* note 112, at 60–78 (discussing the legal rights of stepparents).

standard.[181] As discussed in this Article, the best interest standard may indeed be appropriate because of its contextuality; nonetheless, it provides no real guidance for sorting through the claims of the different adults.[182] If we choose to recognize multiple parents, we must recognize that this multiplies the indeterminacy inherent in determining the child's best interests.

F. *Conclusion*

Each of these approaches represents an attempt to provide some certainty and predictability to the increasingly complex issue of determining parentage. More importantly, each approach shows that the parentage decision will determine custody. When we define parent, we are also framing child custody disputes. The best interest of the child standard thus enters at a second stage; it only applies between people deemed to be parents, when there is an intraparental conflict.[183] Throughout all custody situations, then, the status of the adults involved, once again, sets out the framework for determining children's rights. Children's interests and parental rights may be coterminous in most custody disputes; nonetheless, children must be explicitly accorded recognition during the proceedings that determine their future.

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[181] Under a best interest standard, many children would probably be removed from their poor families because of their mothers' problems in receiving benefits and finding housing. *See* VALERIE POLAKOW, LIVES ON THE EDGE: SINGLE MOTHERS AND THEIR CHILDREN IN THE OTHER AMERICA 66, 91 (discussing the arbitrariness of intervention by child abuse and neglect authorities in poor women's lives); Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1493 (1994).

[182] A third problem is with the child's ability to bond with numerous adults. As discussed *infra* notes 192–93, however, a child may bond with more than one or two caretakers.

A Wisconsin court suggested a fourth, primarily logistical, problem with granting parental rights to more than two people: a child would be subjected to numerous custody and visitation arrangements. *See In re* Interest of Z.J.H., 471 N.W.2d 202, 208 (Wis. 1991). This problem is, however, already implicit in any situation where the parents separate; not only will the parents need to arrange visitation schedules, but grandparents may also seek access to the child.

[183] As discussed earlier, this two-stage process is obscured in the context of divorce, when custody disputes are between husband and wife. Nonetheless, the same process occurs. It is because the law defines the husband and wife as father and mother, and grants them certain rights, that custody is almost invariably awarded to one of them.

V. RECOGNIZING PARENTS AND CHILDREN IN RELATIONSHIPS

It is important, then, to recognize the rights of both parents and children, to allow adults' interests to set out the overall framework, and then to listen to children's interests. In order to respect the rights of both, the law needs to separate the issue of who is entitled to the bundle of rights associated with parental status from the issue of what custodial arrangement is in the child's best interests.

A. *The Importance of Acknowledging Parental Rights*

In a significant article reinterpreting the Court's parental custody and control cases, Professor Barbara Bennett Woodhouse argues that parental rights are often based on notions of children as property.[184] She asserts that the common law tradition of viewing fathers as entitled to do what they wished with their children has made a contemporary reappearance in doctrines recognizing the rights of biological parents over a child's relationships with significant others.[185] She argues, instead, for a more child-centered family law jurisprudence that recognizes children's interests in stability and care, rather than parental rights to their "property" interests in their children.[186] Other scholars have similarly charged that children's voices are excluded from the law.[187] Indeed, James Dwyer attacks any claim that, to protect the adults' interests, parents should have any rights to raise their children.[188] He asserts that the strength of parental desires to raise a child is insufficient to justify their rights; that it is anomalous to grant parents rights over others when the law does not grant such rights of control in any other situation; and that parents do not need rights in order to "satisfy their interest in caring for a child."[189] He

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[184] *See* Woodhouse, *supra* note 23, at 1113–17; *see also* Mahoney, *supra* note 112, at 43 (charging that the ownership model of parenthood, in which courts seek to decide who can exercise rights to a child, leads to "the commodification of children").

[185] *See* Woodhouse, *supra* note 23, at 1113–14.

[186] *See id.*; Woodhouse, *supra* note 79, at 1827–28.

[187] *See, e.g.*, Fitzgerald, *supra* note 46, at 15–17; *see also* Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 6 (1986).

Katherine Federle argues that to truly respect the rights of children, we must treat them as a party to any dispute that affects them, and, to ensure adequate representation, appoint them counsel. *See* Federle, *supra* note 49, at 1562–64. She believes, for example, that children must approve any custodial outcome that affects them.

[188] *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1439 (1994).

instead argues that parents should have Hohfeldian privileges,[190] and that children's rights, as asserted by the state pursuant to a substituted-judgment approach, should trump parental rights.[191]

While I agree that it is critical to respect children's rights and relationships, to make decisions that are in their best interest, and to listen to them, I believe that parents' rights can also be respected without classifying children as property or without ignoring children's actual interests. Instead of reinforcing a dichotomy between the interests of parents and the interests of children, we should recognize that in most cases, they overlap significantly.[192] Even when

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[189] *Id.* at 1440. He also dismisses the rationale that parental rights are necessary in order to ensure that poor parents are not subject to discrimination. *See id.* at 1439 n.281.

[190] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[191] Mr. Dwyer's arguments against granting child-rearing rights to parents and his alternative approach are not, however, persuasive. First, a substituted-judgment approach is highly problematic in and of itself. *See* TOM BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 171–73 (4th ed. 1994). As applied to children, it is particularly difficult. *See, e.g., id.* at 172; DONALD VANDEVEER, PATERNALISTIC INTERVENTION 401 (1986) (noting that where the person has never been "competent," the substituted-judgment doctrine is irrelevant). It also ignores the importance of any separation-of-powers model with respect to determining children's interests. *See* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994). Second, notwithstanding the allegation that no other group asserts such life-determining rights over any other group, it is clear that the parent-child relationship is different from any other legal relationship. *See, e.g.*, REGAN, *supra* note 149, at 176–83 (discussing the importance of status in family relationships). Third, Dwyer is too quick to dismiss the equal protection claim; he states that "poverty of the parents *generally* does not by itself make removal the best option for the child." Dwyer, *supra* note 188, at 1439 n.281 (emphasis added). Thus, poverty may actually be sufficient to justify removal under his scheme. In light of the differential treatment of poor and rich women within family law, poverty could easily become the only reason to remove children in the absence of strong parental rights. *See generally* Ashe & Cahn, *supra* note 86; Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993). Finally, because Dwyer dismisses any interests that parents may have in child-rearing as an insufficient justification for parental rights, he accords no weight whatsoever to those interests, even as part of a larger equation.

[192] As discussed later in this Article, obviously, the most difficult cases do involve conflicts between parents' and children's rights (and relationships). After the Court denied certiorari in *Baby Richard*, 115 S. Ct. 1820 (1995), I recall a discussion on the Internet about which set of parents were acting selfishly, without regard to the child's best interests. Some maintained that the adoptive parents should have arranged visitation between the biological parents and Richard in order to ease the eventual transition, while others maintained that the

the interests diverge, however, respecting children's interests does not mean overlooking adults' interests, nor should recognizing adults' interests mean trivializing children's interests.

Parents develop complex emotional and psychological bonds with their children that should be respected by the law. Even when children do not live with them, parents can develop significant relationships with their children that benefit both the parent and the child. This happens, perhaps most obviously, when a noncustodial parent continues to visit the children after the parents have separated. It also happens when a child has been placed in foster care and the parent(s) remain in contact with the child.[193] And, most pregnant women feel a bond with the child that they carry.[194] Recognizing those connections and relationships does not necessarily mean that parents have property rights in their children; it simply means respect for relationships from the parents' perspective.[195] As Professor Bartlett points out: "If we have to choose between children and adults, we may prefer to be a society which puts the child's interests first, but our larger concern is how the interests of both parent and child link together in relationships."[196] This suggests the importance of an explicit recognition of parental rights and relationships.[197] Parental rights are

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biological parents should have recognized that it was in Richard's best interests to remain with the adoptive parents.

This discussion shows how language affects our perspective as to what constitutes children's best interests and parental rights. Each set of parents could have phrased its arguments in best interest of the child terminology.

[193] *See* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 469 (1983); Kurtz, *supra* note 181, at 1518–19. Even in abusive relationships, there is generally some connection between the child and her biological parents. *See* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 998 (1995); Ashe & Cahn, *supra* note 86, at 77–78; Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 497–99 (1993) (recommending "weak adoptions" for older children in foster care).

[194] *See* Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 363 (1989); Jackson, *supra* note 167, at 1820 n.23; Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1337–39 (1990) (emphasizing the importance of maternal-fetal interdependence).

[195] *See* Bartlett, *supra* note 170, at 295. Even though parents may not always act in their children's best interests, *see, e.g.*, Lupu, *supra* note 191, at 1327, they still maintain connection to their children and often believe that they are doing what is best.

[196] Bartlett, *supra* note 170, at 304; *see also* Czapanskiy, *Grandparents*, *supra* note 5, at 1361–63 (discussing how not to privilege the interests of grandparents, parents, and grandchildren over each other and, instead, to respect their interdependent relationships).

[197] Feminists have been concerned with distinguishing relationships from rights, while recognizing the importance of both. *See* Bartlett, *supra* note 40, at 842–43. When we are

already implicit in our family law system, beginning with our deeply held assumptions about the fitness of biological parents with respect to the custody of their children.

A more explicit recognition of adult interests and attachments in the parentage determination might lead to recognizing multiple parents in certain situations involving conflicts between the adults.[198] In surrogacy situations, the "intending" parents and the surrogate mother all have an interest in and some type of relationship to the child, and so perhaps all should be recognized as parents.[199] Where gestational and genetic parenthood is different, then it also may be important to recognize multiple parents based on their connection to the child.[200] In the "unwed" father cases, where the mother is married to a man who is not the biological father, there are, perhaps, two men who could have paternal rights. Of course, the biological father must do more than contribute sperm, but, under the facts of *Michael H.*, the state gave the unwed father no opportunity to prove his interest.[201] And, in the adoption context, at some point after the child has lived apart from her biological parents (perhaps three months), the potential adopters should also be granted parental rights. Then, within that given universe of parents, courts can make the appropriate custody and visitation determinations by listening to the child's voice and respecting her perspective. For the child, retaining (or building) connections with multiple

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talking about parents, I believe that rights and relationships are intertwined; there must be the right to establish a relationship, and the relationship can help to establish the right.

[198] Some have suggested that babysitters, or that anyone who snatches a child from the grocery store, would be entitled to parental rights. *Cf. In re* J.W.T., 872 S.W.2d 189, 199 n.1 (Tex. 1994) (Enoch, J., dissenting). This is a red herring. Parental rights must have some colorable legal claim; kidnapping constitutes an illegal claim. Parental rights must have some basis in relationship and responsibility. Babysitters only have derivative responsibility; the parent retains ultimate authority.

[199] This brings together the intentional approach to parenthood with positions advocated by feminists, and will probably make neither of them happy. Many feminists are antisurrogacy under any circumstances; they believe that if surrogacy occurs, the surrogate mother should be the sole parent of the child. *See, e.g.*, PHYLLIS CHESLER, SACRED BOND 16–17 (1988). While I too believe that surrogacy can be exploitative, my proposal only addresses those situations where surrogacy has occurred and the surrogate is claiming parental rights. I am not discussing the legal permissibility of surrogacy itself.

[200] Kandel suggests that this should be based on biology. *See* Kandel, *supra* note 108, at 190. I, instead, believe it should be based on both biology and emotional connection.

[201] *See* Michael H. v. Gerald D., 491 U.S. 110, 113–16 (1991). For a contrary view of *Michael H.* that respects the interrelationship of the family members, see REGAN, *supra* note 149, at 131–36.

adults is a means of respecting her relationship with the people who care the most about her.[202]

Recognizing multiple parents complicates custody decisionmaking, and should not be the automatic response to contested adoptions, surrogacy, and similar cases.[203] Indeed, in most cases, there will be no need to think about multiple parents because there will be no conflict between the parties. Where a gestational and a genetic surrogate agree, for example, that the genetic woman is the mother, then, assuming the legality of surrogacy, a statutory presumption recognizing both women as mothers is nonsensical. In that situation, the gestational mother has no desire to act as a parent and has no interest in exercising parental rights. The law should not require her to do so. Similarly, in adoption cases, where the biological mother and father agree to relinquish their child for adoption, then it seems desirable to terminate their parental rights.[204]

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[202] The concept of multiple parents is generally something that would benefit children. In fact, recognizing multiple parents can easily be justified from a child's perspective. *See* Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410 (1994). Professor Woodhouse, who advocates a child-centered approach, would "recognize gestational parenting as part of the continuum of care and . . . [would] emphasize that pre-verbal children benefit from and respond to nurturing, and may lose something of value if permanently separated from a source of parenting." Woodhouse, *supra* note 79, at 1850 n.450. For information on the psychological aspects of nurturance, see Eleanor Willemsen & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439, 442–43 (1996).

[203] I am not taking a position on the ideal number of parents for every child. Social science and psychological research is inconclusive as to whether single parent, two-parent, or multiple caretakers is the best structure for bringing up children. *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 151, at 145–50; Dowd, *supra* note 123, at 21–24; Lupu, *supra* note 191, at 1331–32; *see also* Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 423–25; Jackson, *supra* note 167, at 1821 n.26 (accepting that a traditional two-parent structure is best for children, but noting that many children are successfully brought up outside of such a structure). Given the cultural variations in family form, at any rate, I hesitate to "essentialize" one structure.

It does seem important to ensure that there is at least one consistent "caregiver" for a child. *See generally* GOLDSTEIN ET AL., *supra* note 71. And, although the psychological literature has not yet definitively proven "the upper limit regarding how many close attachments infants can form, . . . the intimate and responsive nature of the caregiving relationship that produces secure attachment would suggest the number is not great." Willemsen & Marcel, *supra* note 202, at 468–69. Given the inconclusiveness of psychological research, as to the precise number, the number of parents allocated to a child seems to depend more on sociological, cultural, and legal constructs.

[204] If the biological parents want to retain some connection to the child, then an open adoption, where the records are not sealed and the biological parents have some visitation

But, where there is a conflict between different adults, any of whom could arguably be classified as parents, then we may not benefit them or the child by somewhat arbitrarily designating one or two as those who can exercise parental rights. Instead, where each of them has declared a willingness to assume responsibility for the child, and each has a legal connection based either on biology or already having cared for the child for a significant period of time (including, I think, gestation), then we may want to recognize all of them as parents.[205]

Thus, under this proposal, the *C.C.R.S.* case would have a similar outcome in terms of the number of potential parents, although the custodial outcome might differ. The *Baby Jessica* and *Baby Richard* cases would result in recognizing two sets of parents, leaving the issue of how to arrange custody and visitation to a second legal stage. In the gestational surrogacy cases, both the genetic and gestational contributors would be considered the mothers. In traditional surrogacy cases, both the intending woman and the surrogate would be considered mothers.

It thus seems to me that there are two reasons for identifying multiple parents at the initial stages of custody decisionmaking. First, this recognizes the emotional attachment that adults develop toward children, and that children

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rights, may be a good solution. *See, e.g.*, Garrison, *supra* note 193, at 444–45; Zierdt, *supra* note 193, at 497–99 (recommending "weak adoptions" for older children in foster care); Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984); *see also* ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE 219–25 (1970) (discussing the importance of maintaining connections postadoption); Appell, *supra* note 193, at 998 (same). Even where the biological parents have relinquished their rights, it may not be appropriate to seal the adoption records so that future contact, once the child reaches a certain age, is possible.

[205] This proposal for the basis for recognizing parental rights draws on the insights of Katharine Bartlett, Karen Czapanskiy, and Mary Shanley into the issue of parent identification. *See supra* note 170. Professor Bartlett addresses the multiple-parent concept only in the context of families which are no longer nuclear. This differs from the functional-family approaches where the members actually live as a family. *See* Minow, *supra* note 85, at 270–75.

Professor Joan Mahoney advocates the inclusion of "all of those who have played a parental role in a child's life as parents, whether or not the nuclear family has broken down and whether or not any other legally recognized parent intended to include him or her." Joan Mahoney, *Adoption as a Feminist Alternative to Reproductive Technology*, *in* REPRODUCTION, ETHICS, AND THE LAW 35, 47 (Joan C. Callahan ed., 1995). She explains that it is important to value nurturance over genetics because the parent-child relationship, rather than the biological connection, is more important. *See id.* at 48. While I generally agree with her approach, I am not sure that I would place a greater value on nurturance than genetics; they should each play a role in deciding the identity of the parent, to prevent race and class biases from determining the parenting outcome.

develop toward adults.[206] Second, it limits discretion at the initial stage of custody decisionmaking by ensuring that all adults who might be appropriate custodians for the child are involved. The identification of multiple parents does not provide the ultimate answer to custody determinations, but it does establish the framework. The child's best interest should not be relevant at the stage of identifying the parents; rather, it should be relevant only at the stage of determining custody. Such a process separates parents' interests from children's interests.

There are, as discussed above, many objections to the recognition of multiple parents, beyond the fear that it would complicate custody decisionmaking. It would be contrary to strongly held legal presumptions about the sanctity of the two-parent family and the sanctity of contract.[207] Families that deviate from the norm of two heterosexual parents are stigmatized, both legally and culturally.[208] For example, the increasing number of single-parent families is blamed for the increase in welfare, while the Court held in *Michael H.* that a child's request for constitutional respect of her relationship with two fathers had "no support in the history or traditions of this country."[209]

Some may also perceive a multiple-parent approach as antifeminist because it threatens women's dominant role as caretaker.[210] It might be seen as diluting

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[206] Not surprisingly, recognizing multiple parents can also be justified from a child-centered perspective. *See* Strengthening Children's Associational Rights, Panel at the Temple Law School Conference on Children's Rights (Sept. 30, 1995) (on file with author).

[207] As discussed above, see *supra* note 170, the two-parent family is not always the best familial form. As for the sanctity of contracts with respect to family matters, there is, and should continue to be, an uneasy fit between the two. *See* Naomi Cahn, Intrafamily Contracts (unpublished manuscript, on file with author).

[208] *See, e.g.*, Dowd, *supra* note 123, at 20; Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497 (1990–91). David Blankenhorn explains that single-parent families, without fathers, are deviant. *See* DAVID BLANKENHORN, FATHERLESS AMERICA (1995). The actual data on the benefits of two-parent families is somewhat contested. *See* SARA S. MCLANAHAN & IRWIN GARFINKEL, SINGLE MOTHERS AND THEIR CHILDREN (1986); Dowd, *supra* note 123, at 35–42.

Studies of gay and lesbian parents show that their children are as psychologically and socially well-adjusted as children who grow up in heterosexual families. *See* WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE 112–13 (1996); Polikoff, *supra* note 13, at 561–66.

[209] Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).

[210] Of course, there is no one feminist position on the family. Some feminists advocate primary respect for the woman's role as caretaker and nurturer. *See* Becker, *supra* note 41, at 203–04; Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 666–67 (1992). Some advocate equal respect for men's potential roles. *See, e.g.*, Bartlett & Stack,

the mother's rights to custody because, in some situations, it recognizes the interests of other potential parents.[211] Moreover, such a standard might allow men who had lived with the biological mother and child, but who are otherwise emotionally unconnected or even abusive, to be granted parental status.[212] This may place additional pressures on women to stay with men, or to conform to appropriate gender roles, because of a fear of losing custody.

Nonetheless, the overall benefits to the parents, and ultimately to the child, may outweigh the difficulties. First, given the increasing number of families who do not fit the traditional family form, this approach recognizes, without necessarily ratifying, that reality.[213] Multiple parents already exist because of divorce and the formation of new families;[214] but, multiple parents also may exist at the birth of a child where various adults have made different contributions to the child's existence. The multiple-parent approach permits experimentation outside of the nuclear family.

Second, as Dean Joan Mahoney points out, courts should be able to sort out frivolous claims from nonfrivolous ones.[215] Third, and finally, this approach ensures that both adults and children who have invested significant time and effort in a relationship can look forward to continuing that relationship. It protects the interests of would-be adoptive parents, both biological parents, surrogates, and intended parents. It specifically recognizes that parents make a major contribution to the parent-child relationship, regardless of the child's desire to recognize that contribution. This explicit acknowledgment of parental interests is a critical and potentially radical component because it does not justify parental rights with respect to children's interests.

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supra note 156, at 21. Some feminists focus on the child. *See, e.g.*, Woodhouse, *supra* note 79, at 1830–31.

[211] As discussed *supra*, unless custody cases are contested, women are more likely to receive custody. *See, e.g.*, MACCOBY & MNOOKIN, *supra* note 28, at 112–14; LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985).

[212] *See* Mahoney, *supra* note 205, at 47; *see also* Barkaloff v. Woodward, 5 Cal. Rptr. 2d 167 (Cal. Ct. App. 1996) (reversing a trial court award of visitation to alleged batterer who was not the biological father).

[213] Correspondingly, it prevents discrimination against poor parents; children cannot be removed from their parents based simply on income. *See supra* notes 188–91 (discussing James Dwyer); notes 87–121 (discussing surrogacy).

[214] *See* Bartlett, *supra* note 13, at 880–82.

[215] Mahoney, *supra* note 205, at 47.

While I am concerned that batterers will use their potential rights as parents to continue the abuse against their victims, *see* Cahn, *supra* note 30, and that courts may see concerned men, rather than abusers, *see* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339 (1995), this seems to be a risk that must be assumed.

Nonetheless, the determination of parent is only the first step. Children's interests become central and critical at the second stage. Thus, the biggest difficulty of an approach that recognizes multiple parents is that it continues to require some method for determining the appropriate custodial situation.

B. *Rethinking the Best Interest of the Child Standard*

As discussed earlier, the appropriate method for recognizing children's interests in a custody determination is highly contested, at least within the scholarly literature. Defenders of the best interest standard claim that, when properly applied, it truly makes decisions that are best for the child. On the other hand, critics of the standard charge that it is indeterminate, that it is inherently biased in application, and that it functions as a cover for parental interests.[216] Proponents of other approaches argue that they more accurately serve as a proxy for representing children's interests.

Under current law, the best interest standard serves as the primary existing method for recognizing children's rights and interests.[217] In the context of this Article, the question about the best interest standard is, especially in light of its problems, whether it should be generally applicable when there are multiple adults with parental interests. As June Carbone points out, "the best interests principle is, although sometimes weaker, never stronger than the theoretical framework that underlies it."[218] When that theoretical framework is based on numerous values that are irrelevant to the child herself, then the standard is meaningless for determining how best to serve the child.

Nonetheless, I conclude that the best interest standard is the appropriate formulation for ensuring that children's voices are heard at the second stage of custody proceedings. Once we acknowledge that children's interests and attachments are critical, we must develop some mechanism for according children some recognition. Others have suggested alternatives to the best

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[216] An even more fundamental critique of the standard questions the significance it attaches to the child's best interests.

[217] For a defense of the best interest standard, in that it does focus on the individual's interests, as opposed to those of other interested parties, see BEAUCHAMP & CHILDRESS, *supra* note 191, at 178–80. For a defense of the standard because it allows for judicial discretion, see Schneider, *supra* note 30, at 2261.

Of course, decisions on custody become infected with different biases, such as the prejudice towards the normal-looking family unit. *See* Czapanskiy, *Grandparents*, *supra* note 5, at 1324; Dolgin, *supra* note 4, at 691. We can help to protect against these biases by naming multiple parents so that a choice against a single parent and for a traditional family unit becomes a clearer exercise (and, perhaps abuse) of discretion.

[218] Carbone, *supra* note 7, at 723; *see* Federle, *supra* note 49, at 1532 (critiquing the best interest standard).

interest standard, such as a system based on parental privileges and children's interests,[219] or one based on granting children explicit financial stakes in the family estate,[220] or one based on approximating past parental roles in a custody award so that judicial discretion is at a minimum.[221] But these other solutions serve as inadequate proxies for use of the best interest of the child standard, and may not appropriately recognize the children's interests.[222]

Many of the alternatives to the best interest standard continue the problem of conflating parents' and children's interests, thereby inadequately incorporating each into the decisionmaking process. While I concede that the best interest standard has many problems, what is most important for me is explicitly establishing a two-stage process to ensure that this conflation does not occur. Thus, I would find acceptable an alternative to the best interest standard which respects that children's interests are heard at the second stage. For example, rephrasing the child's interests in terms of a "right to nurture" might provide better guidance for recognizing the values that are significant in choosing the appropriate custodian(s) among the different options.[223]

Using a best interest standard means that the parenting solutions discussed above, which completely and definitively resolve the custody decision at the first step of determining the parents, are problematic because they do not explicitly allow for children's interests. Thus, the biology solution, which recognizes only the rights of biological parents, is inadequate. Similarly, the intent approach, which focuses only on the intent of the parents, has no space for the child's interests; the sole determinant of custody is who originally expected to assume responsibility. The mother-child dyad solution assumes that children's primary interests are served by remaining with their mothers, without permitting any contrary showing.[224] Consequently, none of these adequately includes the actual voices and perspectives of children.

The two other solutions, based on multiple parents or responsibility, still allow for the recognition of children's interests at the second stage of the custody process. Thus, either of them might be appropriate so long as they are applied with the understanding that they represent only the first stage. At the

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219 *See* Dwyer, *supra* note 188, at 1446–47.

220 *See* Fitzgerald, *supra* note 46, at 100–02.

221 *See* Scott, *supra* note 46, at 630.

222 Others have reluctantly returned to the best interest standard after surveying the alternatives. *See, e.g.*, Chambers, *supra* note 39, at 568–69; Mnookin, *supra* note 36, at 282.

223 Eleanor Willemson and Kristen Marcel emphasize the importance of identifying what they term a "'right to nurture' or 'right to continued family relationships'[.]" Willemson & Marcel, *supra* note 202, at 473.

224 A presumption for the mother, subject to rebuttal based on a showing of the child's attachment to another person (or persons), might be a more appropriate standard. This, too, remains subject to the other criticisms, discussed *supra*, of the standard itself.

second stage, that of the child's best interests, parents' wishes as to custody, which is now a common factor in many best interest statutes (and indeed the first factor listed in the UMDA),[225] would only be relevant in the actual structuring of the custodial situation. The presumption would be that the parents each want custody or visitation, and it is up to the court to determine what custodial outcome will best reflect the child's interests.[226] With multiple parents, a variety of possible outcomes is possible, depending on the situation of each of the "parents," such as awarding custody to two parents, some visitation to a third, and no visitation to a fourth parent. In the cases discussed in this Article, the child's best interests will, in some sense, "trump" parental rights; but this proposed method sets out a broader concept of the parents who are subject to the best interest standard. Courts must still structure the appropriate custodial situation, which is unlikely to involve joint custody between four different caretakers, simply because of the lack of stability for the child.

Using this two-step process does not just affect custodial decisions outside of the traditional nuclear family. For conventional families, the difference this approach makes is that adults' rights are explicitly recognized and accorded weight, while children's interests are recognized as both intertwined with those of adults but also separate. The "theoretical framework" shifts from a rhetorical focus on the interests of the child to an actual focus on the rights of both parents and children. Custody decisionmaking becomes a more authentic process in which courts are explicitly charged with separating adults' and children's interests.

VI. CONCLUSION

Thus, there exists, albeit implicitly, a two-stage approach for deciding custody disputes. Recognizing the utility of such an approach can lead to respect for all those affected by the custody determination. Defining the universe of possible custodians is the first step in all custody decisions, and is the method for respecting parental rights. Given that the significance of parenthood depends on legal and social constructs, we should not be afraid to vary the meaning of parenthood depending on the parent's interests and the child's situation. Nor should we hesitate to recognize parental rights at some

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[225] *See* UNIF. MARRIAGE AND DIVORCE ACT § 402 (amended 1973), 9A U.L.A. 561 (1987).

[226] Of course, parental wishes would still be important when it comes, for example, to imposing joint custody on two parents who both vehemently oppose it. Similarly, a court should take into account, in an adoption, the wishes of both the birth parent(s) and the adoptive parents with respect to further contact. For further discussion of the importance of contact between birth parents and the child, see Appell, *supra* note 193, at 998.

stage in the custody determination.[227] The second step, examining the child's "best interests," imperfect as it is, stands as a proxy for integrating children's voices and interests into these decisions.

The belief that children's best interests already control custody decisions is subject to challenge based on various critiques of the best interest standard; it is indeterminate and biased in administration. More fundamentally and less obviously, the application of the best interest standard depends on a series of other decisions that determine the potential custodians subject to the standard. The best interest standard is, for example, subsumed if we base our laws on a mother-child dyad. We seek to assure ourselves that the best interest standard is applied without reference to other influences and that we are truly considering only the child's welfare. But the standard is only applied in the context of parental rights, responsibilities, and interests.[228]

Resolving custody situations inevitably requires balancing the rights, interests, and relationships of all of the potential parents and children. Use of the best interest of the child standard has too often served political definitions of what constitutes a family, and who should be entitled to custody, rather than serving the best interest of the child herself.

Redefining the concept of parent, and those who can be classified as "parent," at least makes explicit the political judgments. Determining who constitutes a parent establishes the framework in which custody decisions will be made. Like the best interest standard, the concept of parent is shifting and political. Instead of giving discretion to courts to make the initial decision of who will be a parent, it may be better simply to designate as parents any (and all) possible adults who deserve that title, thereby removing discretion from one aspect of the custody-making process, and respecting the potential and actual attachments of significant adults in the child's life.[229]

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[227] The Senate and House have recently considered a Parental Rights and Responsibilities Act, which would provide virtually absolute rights to parents, at the expense of both children and any state interests. *See* S. 984, 104th Cong. (1995); H.R. 1946, 104th Cong. (1995). Such legislation is dangerous because it does not recognize the need to balance parents' and children's interests, much less the need to place children's interests first when they conflict with parental rights. For criticisms of the Parental Rights and Responsibilities Act, see Symposium, *Meeting the Basic Needs of Children: Defining Public and Private Responsibilities*, 57 OHIO ST. L.J. 317 (1996); *see also* Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996).

[228] There are different standards for disputes that are not between the parents. In abuse and neglect, where it is the state suing a parent, the standard is generally harm to the child or unfitness of the parents.

[229] There cannot be numerous such adults in a child's life without diluting the concept of "attachment." *See* Willemson & Marcel, *supra* note 202, at 469.

Naming multiple parents has implications for the meaning of parenthood beyond those situations involving surrogacy and adoption. It helps to show the social construction of parenthood, as well as the contextualization of any custody decision. By designating as parents those people with biological or strong nurturing connections to children, we show the significance of both aspects of parenthood. We also see how parenthood is a constructed concept, dependent on cultural definitions of who is a parent. Parenthood is not an unchanging, constant status based on immutable characteristics; instead, it is "pragmatic, *ad hoc*, contextual, and local."[230]

Simultaneously, parentage sets the framework for child custody. Thus, the custody decision is indeterminate not just because the meaning of the best interest of the child is so variable, but also because the definitions of parental rights are socially contingent. So, the framework itself for the standard is somewhat unstable. Nonetheless, we can use this instability to help strengthen our custody decisionmaking. We protect both the child's and the parents' interests by ensuring that there are no unnecessary emotional ruptures and by reinforcing a network of caring adults.

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[230] Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism, in* FEMINISM/POSTMODERNISM 19, 21 (Linda J. Nicholson ed., 1990).